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ORIGINAL
7 6 No. 12389

960
United States
Court of Appeals

For the Ninth Circuit.

RECONSTRUCTION FINANCE CORPORATION, a corpora-
tion,

Appellant,

vs.

M.W.MOUAT, Individually, and as Administrator
of the Estate of May Paula Mouat, Deceased,
and as Trustee of an express trust,

Appellee,

and

M.W.MOUANT, Individually and as Administrator
of the Estate of May Paula Mouat, Deceased, and
as Trustee of an express trust.

vs.

RECONSTRUCTION FINANCE CORPORATION, a corpora-
tion,

Appellee.

Transcript of Record

Appeals from the United States District Court of Appeals
for the District of Montana.

No. 12389
DISTRICT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 7 - 1950

United States
Court of Appeals
For the Ninth Circuit.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

MAY PAULA MOUAT and M. W. MOUAT, wife and husband,
and MAY PAULA MOUAT, as trustee of an express trust,
Appellees,

and

MAY PAULA MOUAT and M. W. MOUAT, wife and husband,
and MAY PAULA MOUAT, as trustee of an express trust,
Appellants,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellee.

Transcript of Record

Appeals from the United States District Court,
for the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the District of Montana, Billings Division

No. 871

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and MAY PAULA MOUAT as
Trustee of an express trust,

Plaintiffs,

vs.

RECONSTRUCTION F I N A N C E CORPORA-
TION and WAR ASSETS ADMINISTRA-
TION, an agency of the United States of
America.

Defendants.

COMPLAINT

The plaintiffs complain and allege:

I.

That Reconstruction Finance Corporation at all
times herein mentioned was and now is a corpora-
tion organized and existing under and by virtue of
the laws of the United States of America, and doing
business in the District and State of Montana.

I—a.

This action arises under the Act of 47 Stat. 5,
U. S. C. A., Title 15, Sec. 601 et seq., as amended 54
Stat. 574, U. S. C. A., Title 15, Sec. 613c, and under
Judicial Code Sec. 24, U. S. C. A., Title 28, Sec. 41.
The matter in controversy exceeds, exclusive of in-
terest and costs, the sum of Three Thousand Dol-
lars.

II.

That War Assets Administration is an agency and has been such agency of the United States Government, established by executive order of the President, His Excellency, Harry S. Truman, on January 31, 1946, and functioning and doing business in the state and district aforesaid, and it is also, and has been such since the said executive order, an agency and branch of the other defendant, Reconstruction Finance Corporation.

III.

That at one time, and throughout the year 1941, Metals Reserve Company, was, and until January 30, 1945, continued to be a corporation [3*] organized and existing under and by virtue of the laws of the United States, and doing business in the State and District of Montana.

IV.

That the plaintiff, May Paula Mouat, is the trustee of an express contract trust, evidenced by a written instrument, a declaration of trust of date on or about December 13, 1941, and she is trustee under said written trust for M. W. Mouat, J. G. Link, Martha M. Link, O. F. Goddard, R. L. Duba, Celia Duba, H. E. Duba, Opal Duba, J. J. Mouat Jr., Helen Mouat, R. F. Adam, Susie C. Rohder, Frederick Rohder, P. A. DeLannoy, Margaret DeLanoy, Lillian Duba Wittman, W. C. DeLannoy, Lois E. DeLannoy, Charles L. Buck, Geneva Buck, Glen S. Buck, E. A. Rowe, Florence E. Rowe, Charles S. Ridley, William D. Jones and Edith M. Jones.

* Page numbering appearing at bottom of page of original certified Transcript of Record.

V.

That the plaintiffs are each and every one of them citizens of the State of Montana, residents in the district aforesaid, and in the Billings Division.

VI.

That on or about the 20th day of December, 1941, in the State of Montana, Metals Reserve Company aforesaid and the plaintiffs aforesaid, for mutual considerations of value proceeding each to the other, did make, execute and deliver between themselves a certain contract in writing, a mining lease, wherein the plaintiffs were lessors and Metals Reserve Company, then existing, was lessee. There is annexed to this complaint and made a part hereof a true and exact copy of the said mining lease, marked Exhibit A, and this is done with the same intent, force and effect as if the said written contract were set out here in the body of the complaint.

VII.

That the said written contract, Exhibit A, existed between Metals Reserve Company and these plaintiffs until June 30, 1945; upon such date, by statute duly enacted by the Congress of the United States, all of the assets of Metals Reserve Company, including [4] the said lease, Exhibit A, and rights thereunder, were transferred to defendant Reconstruction Finance Corporation, and likewise on said June 30, 1945, by similar Act of Congress of the United States, all of the liabilities existing against Metals Reserve Company were made liabilities of Recon-

struction Finance Corporation, and it by law assumed all liabilities of the said Metals Reserve Company on said date; and particularly there was included in such Act of Congress the rights of Metals Reserve Company in and to Exhibit A, and said Reconstruction Finance Corporation was made liable to perform all of the obligations in said Exhibit A binding on Metals Reserve Company as lessee, and on said day Reconstruction Finance Corporation actually became the assignee of the lessee's interest in the said lease, and until this date said Reconstruction Finance Corporation remains the assignee and actual lessee under Exhibit A, and liable for the faithful performance of all the obligations in said Exhibit A originally binding on Metals Reserve Company.

VIII.

And since the creation by executive order of War Assets Administration the defendant War Assets Administration has been at all times liable for and by law compelled to observe as an agency of Reconstruction Finance Corporation all of the obligations in Exhibit A on the lessee therein binding.

IX.

That on November 15, 1945, Reconstruction Finance Corporation, a defendant, duly gave by mail to the plaintiffs at Columbus, Montana, a certain notice in writing of termination of and cancellation of the said lease, Exhibit A, which was to take effect February 28, 1946; that such notice is in words and figures as follows:

“Reconstruction Finance Corporation
Office of Metals Reserve

Registered Mail —

Return Receipt Requested

Washington 25, D. C.

Nov. 15, 1945.

Mrs. May Paula Mouat, Mr. M. W. Mouat
and Mrs. May Paula Mouat, as Trustee,
Columbus, Montana

Dear Mr. and Mrs. Moaut:

Pursuant to Public Law 109, 79th Congress, approved June 30, 1945, Metals Reserve Company was dissolved effective July 1, 1945, [5] and all of its functions, powers, duties and authority, together with its documents, books of account, records, assets and liabilities of every kind and nature were transferred to Reconstruction Finance Corporation to be performed, exercised and administered by Reconstruction Finance Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation.

Under date of November 2, 1945, the War Production Board wrote us that the operation by us of the properties covered by the lease from you dated December 20, 1941, is not required to satisfy either military or civilian demands. Therefore, Reconstruction Finance Corporation hereby gives notice of its intention to surrender, terminate and cancel and does hereby surrender, terminate and cancel

that certain lease dated the 20th day of December, 1941, covering certain mining property in Stillwater County, Montana, wherein you are Lessors and Metals Reserve Company is Lessee, said surrender, termination and cancellation to be and become effective on February 28, 1946.

As provided in paragraph 14 of the lease, we are making payment of the sum of \$1,000 to The Yellowstone Bank, Columbus, Montana, for payment by said Bank to Mrs. May Paula Mouat, as Trustee. Enclosed is a copy of our letter to The Yellowstone Bank.

For your information, please be advised that we are also cancelling our lease from Dr. Edward Sampson.

Very truly yours,

RECONSTRUCTION FINANCE
CORPORATION,

By MORRIS LEVINSON,

Executive Director

Office of Metals Reserve."

X.

That Metals Reserve Company, before the Congress transferred to the Reconstruction Finance Corporation all of the rights of the lessee under Exhibit A, breached and failed to keep an obligation of the said lease on it then binding, to-wit: as appears in paragraph 7 of the said lease, Metals Reserve Company agreed to pay throughout the term of the lease a minimum royalty of Ten Thousand Dollars (\$10,000) per year, payable quarterly,

on or before thirty (30) days after the end of each calendar quarter; that Metals Reserve Company failed entirely to pay and there was never paid to The Yellowstone Bank at Columbus, Montana, for May Paula Mouat as Trustee any sum at all of the said \$10,000 per year payable quarterly until or at all before or at all after February 28, 1946, as the date of the cancellation and end of the said lease (Exhibit A), and the defendant Reconstruction Finance Corporation is indebted to the plaintiff May Paula Mouat as Trustee in the amount of Ten Thousand Dollars (\$10,000) for the year 1943; Ten Thousand Dollars (\$10,000.) for the year 1944; Ten Thousand Dollars (\$10,000.) for the year 1945, and one-sixth of Ten Thousand Dollars (\$10,000.), to-wit: One Thousand Six Hundred Sixty-Six and 66/100 Dollars (\$1,666.66) [6] for the two months' period in the year 1946, making in all the sum of Thirty One Thousand Six Hundred Sixty Six and 66/100 Dollars (\$31,666.66), no part of which has ever been paid.

XI.

And further, the defendants, and both of them, have broken and failed to keep the terms of said Exhibit A; in Exhibit A the lessee did promise that when for any cause the lease shall terminate, "the lessee shall deliver to lessors a proper release or certificate of that fact, duly executed and acknowledged, and lessors upon such termination, and after compliance (complaince) with all of the terms, covenants and conditions of this lease, shall

execute and deliver to lessee a release and discharge from all further liability hereunder;" that by virtue of the notice of date November 15, 1945, hereinbefore set out, the lease terminated on February 28, 1946, but neither Metals Reserve Company, nor either of the defendants, nor anyone, has delivered any proper release or any release or certificate to that effect acknowledged or executed so that it may be recorded, and thereby clear the title of this cloud by virtue of Exhibit A, and the plaintiffs' title to said premises described in Exhibit A should be quieted and set at rest from any claim under the said lease, Exhibit A.

XII.

That the contract, Exhibit A, provided that "upon the termination of this lease by either party lessee shall surrender peaceably the leased premises and appurtenances in good order, with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and the lessors shall have the right to reenter upon the said leased premises owned by them, and appurtenances, and take full and complete possession of the whole thereof," but at no time since the 28th day of February, 1946, or before such date, have the defendants, or either of them, surrendered peaceable possession of the premises or any part thereof to the plaintiffs or to either of them; the defendants, [7] acting through servants whose names are unknown to these plaintiffs, have caused the front gate to the said prem-

ises to be manned by armed guards day and night; such guards have repeatedly forbidden the plaintiffs to enter the said premises without procuring a written pass, and such guards have ordered the plaintiffs, when leave was requested to enter by plaintiffs, not to enter within a fence surrounding a large part of the said premises and surrounding all of the improvements thereon, and when permission has been given to the plaintiff M. W. Mouat to enter he has been followed by guards, and by a sign forbidden to take within his own property described in the lease either a gun or camera. The plaintiffs have demanded possession of the said property on August 28, 1946, to take effect on and after midnight of August 28, 1946, and such demand has been refused by defendants and by their armed guards placed on the property described in Exhibit A. That the plaintiffs should be given by judgment of the Court peaceable possession and continuous possession of all of the property described in Exhibit A.

That the defendants have further broken and failed to keep the terms on them binding of the said Exhibit A. The defendants agreed to surrender the leased premises and appurtenances in good order upon the termination of Exhibit A. That at the time of the termination of Exhibit A, towit: February 28, 1946, there were seventy-nine (79) separate residence buildings and one store building and one company barracks building, all fitted with modern plumbing fixtures and appli-

ances. That the defendants, at exact times unknown to plaintiffs, but between the 28th day of February, 1946, and the date of filing this complaint, have committed waste upon the said premises, and they have by means of servants and mechanics direct, or by contract with others, dismantled and removed all of the plumbing from the said buildings, though the same was all affixed to the real estate and a part of the said buildings. That the defendants have carried away and converted to their own use all of the said plumbing fixtures [8] and materials composing the same. That the said fixtures and plumbing articles taken from each of the said residence buildings was worth the sum of Five Hundred Dollars (\$500.00), and the whole thereof was worth the sum of Thirty Nine Thousand Five Hundred Dollars (\$39,500.00) taken from the said residence buildings. That the fixtures taken from the said barracks by the defendants were and are reasonably worth the sum of Fifteen Hundred Dollars (\$1,500.00) and by reason of such acts of the defendants in forcibly removing and carrying off and converting to their own use the said plumbing and fixtures the defendants have committed damage and detriment to the appurtenances and to the property described in the lease in the sum of Forty One Thousand Dollars (\$41,000.00), no part of which has ever been paid.

XIII.

That the defendants have completely dismantled twenty-two of the residence buildings on the said

land described in the lease since February 28, 1946, and have piled the lumber in a salvage pile, and threatened to, and unless enjoined by a judgment of the Court will completely demolish and move every one of the said buildings upon the said demised premises; that each of the said buildings already demolished by the defendants was, even after the plumbing was removed, of the value of Six Hundred Dollars (\$600.00).

XIV.

That on February 28, and March 1, 1946, there remained on premises demised in the said lease, Exhibit A, a vast number of tools, much personal property, electrically run refrigerators, and other property, and rails for mining and pipes for mining, wrenches, caps, spigots, bolts, nuts, and other personal property, and that much of the same remained on the property demised for a period of more than six months, to-wit: on August 29, 1946, there remained on the said premises a vast deal of such personal property, not only that particularly described but other kinds; that the lessees, now the defendants above named, did in the said lease, Exhibit A, agree as follows: "That unless there is an understanding to the contrary in [9] writing, anything remaining on the premises herein demised and leased upon the termination thereof for a period of more than six months after such termination shall conclusively be deemed to have been abandoned by the lessee in favor of the lessors;" that the lessees, now these defendants, have kept

an exact, careful inventory of all property removed from the said premises since August 29, 1946; that plaintiffs by reason of being excluded forcibly from the said property by the defendants are unable to tell and do not know and have no means of knowledge or information as to how much the defendants have removed of such things remaining on the said premises after August 28, 1946; that the defendants should be required to account for whatever was taken by them from the said premises since the 28th day of August, 1946. Plaintiffs are informed and believe that the amount of such property so taken from the said premises by the defendants and converted to their own use since August 28, 1946, is of the value of more than Ten Thousand Dollars (\$10,000.00), and all of said property has been converted to the defendants' use against the wish and consent of the plaintiffs, or any of them.

Wherefore, plaintiffs pray for judgment against the defendants;

1. For the sum of Thirty One Thousand Six Hundred Sixty Six and 66/100 Dollars (\$31,666.66) for rents as aforesaid;

2. And for the sum of Forty One Thousand Dollars (\$41,000.) for waste as to the removal and conversion of the plumbing fixtures;

3. And for the sum of Six Hundred Dollars (\$600.00) each for the destruction of twenty-two residence buildings;

4. That the defendants be ejected from the said lands described in Exhibit A, and from all thereof, and that plaintiffs be put in possession of all of the said lands;

5. That the defendants be enjoined from committing any further waste upon the said property or upon any thereof.

6. That an order be made requiring the defendants to account and file a written list and inventory of all property taken from the said premises by them since the 28th day of August, 1946, and that judgment be entered for the value of all such property against the defendants and in favor of the plaintiffs;

7. And for such other and further relief as to the Court may seem meet and equitable, and for costs of suit.

LOWNDES MAURY,
Attorney for Plaintiffs,
THOMAS C. COLTON,
A. G. SHONE,
Attorneys for Plaintiffs.

EXHIBIT A

Mining Lease

This Agreement, made and entered into, in duplicate, this 20th day of December, 1941, by and between May Paula Mouat and M. W. Mouat, wife and husband and May Paula Mouat, as Trustee, of Nye, Stillwater County, Montana, parties of the first

Exhibit A—(Continued)

part, hereinafter called Lessors and Metals Reserve Company, a corporation organized and existing under the laws of the United States, party of the second part, hereinafter called, Lessee,

Witnesseth:

The Lessors, in consideration of the sum of One Dollar (\$1.00), lawful money of the United States of America, to them in hand paid by the Lessee, the receipt and sufficiency whereof is hereby acknowledged, and in further consideration of the covenants and the considerations herein contained and to be kept, performed and observed by the Lessee, do hereby lease, demise and let unto the Lessee, its successors and assigns, for the term of ten (10) years from and after the date hereof, all that certain property described as follows:

Those certain patented quartz lode mining claims situated in Twp. 5 So., Range 15E., M.P.M., in Stillwater County, Montana, known and described as:

Bald Eagle—U.S. Lot No. 69-D,
Mountain View—U.S. Lot No. 63-A,
Rough Rock—U.S. Lot No. 63-B.

Also, all those certain unpatented quartz lode mining claims situated in Twp. 5 So., Range 15E., M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said county on the dates and in the respective books and on the respective pages, as follows:

Exhibit A—(Continued)

Name	Date Cert. Recorded	Book	Page
Adam	July 19, 1941	24 Misc.	207
Prinetons	May 8, 1941	24 Misc.	122
Skunk	May 8, 1941	24 Misc.	128
Sampson	May 8, 1941	24 Misc.	126
Oldeo	May 8, 1941	24 Misc.	124
Link	July 19, 1941	24 Misc.	209
Pete	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	288
Scully	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	286
Denver	Oct. 7, 1918	7 Misc.	233
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	291
Old Lady	July 11, 1918	7 Misc.	114
Westlake	July 11, 1918	7 Misc.	116
Billie	Oct. 17, 1918	7 Misc.	242
Chas. F.	July 11, 1918	7 Misc.	118
(Amended Cert.)			
Old Lady	Oct. 17, 1941	24 Misc.	289
Chas. F.—Continued:			
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	287
Gap	July 31, 1941	24 Misc.	219
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	290
Jame	Oct. 3, 1941	24 Misc.	271
Soup	Oct. 3, 1941	24 Misc.	273
Pine	Oct. 2, 1919	8 Misc.	167

Also, all those certain unpatented quartz lode mining claims situated in Twp. 5 So., Range 15E., M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Park County, Montana, in the records of the said county on the dates

Exhibit A—(Continued)

and in the respective books and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Smelter	Sept. 23, 1887	Vol. 1 Quarts Locations	25
Smelter	June 8, 1889	Vol. 1 Quarts Locations	420

Also, that certain unpatented placer mining claim and that certain unpatented tunnel site situated in Twp. 5 So., Range 15E., M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said county on the dates and in the respective books and on the respective pages as follows:

Name	Date Cert. Recorded	Book	Page
Lake Placer	July 16, 1940	23 Misc.	400
(Amended Cert.)	June 16, 1941	24 Misc.	155
Monte Alto Tunnel and Tunnel Site	Aug. 13, 1918	7 Misc.	159

Also, all of the right, title and interest of said Lessors now owned or which may be hereafter acquired, in and to those certain unpatented quartz lode mining claims situated in Twp. 5 So., Range 15E., M.P.M., Stillwater County, Montana, the certificates of locations of which were recorded in the office of the County Clerk and Recorder of said Stillwater County, Montana, in the records of said county on the respective dates and in the books and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Mountain View Chrome Co. #1	Sept. 22, 1939	23 Misc.	43
Mountain View Chrome Co. #2	Aug. 31, 1940	23 Misc.	434

Exhibit A—(Continued)

Also, all water and water rights, ditch and ditch rights, flumes, easements, rights-of-way, permits from United States Forest Service, buildings and improvements upon or used, or for use, in connection with the above-described premises.

To Have and to Hold said mining claims and property unto the Lessee, its successors and assigns to the exclusion of all others claiming under or through the Lessors herein, for the term of ten (10) years from the date hereof, and subject to termination as hereinafter specified.

In consideration of the premises, it is hereby covenanted and agreed by and between the parties hereto as follows:

1. Lessee shall have the right to explore, mine and extract and remove from said leased mining claims chromite or other chromium bearing ores and any other minerals, metals, precious stones or rocks found in, on or under said leased premises, together with the right, during the continuance of this lease, to take and use any materials suitable for back-filling or other mining purposes and any limestone [13] found on the premises, together with the right to construct all mills, plants, tracks, tramways, roads, buildings and other improvements; and to make all excavations, openings, tunnels, ditches, drains, and other improvements upon said leased premises, which are, or may become necessary or suitable for the mining and removing of chromite or other ores, metals, minerals, rocks and precious stones, the milling and concentrating of the same

Exhibit A—(Continued)

and the processing of such ores, metals, minerals and other materials or the concentrates thereof, and the right, during the continuance of this lease, to cut and use timber and other raw materials found upon or in said premises for any purpose in connection with the operations to be carried on under this Lease, subject only to the exploration contracts between the Lessors and the United States Bureau of Mines of record in the office of the County Clerk and Recorder of Stillwater County, Montana, and in the office of the County Clerk and Recorder of Sweetgrass County, Montana.

2. On or before February 1st, 1942, the sum of Ten Thousand (\$10,000.00) Dollars is to be paid as advance royalty under the terms of this Lease by the Lessee to The Yellowstone Bank, Columbus, Montana, to the credit of May Paula Mouat, as Trustee, for the owners of the property as their interests may appear. This paragraph is specifically subject to the right and option hereinafter contained of the Lessee to make this payment as above set forth or to terminate this Lease by failing to make such payment.

3. The Lessee agrees to pay, during the term of this Lease, a royalty of three and fifty-seven one-hundredths cents (3.57c) per unit of chromic oxide (Cr_2O_3) dry basis (20 pounds of chromic oxide to constitute a unit) contained in the concentrates produced or processed from the chromite ore mined from the hereinabove described mining claims, and on all chromite ore which the Lessee mines from

Exhibit A—(Continued)

said leased premises and sells, ships or permits to be shipped without concentration or processing, the Lessee agrees to pay a royalty of three and twenty-one one-hundredths cents (3.21c) per unit (20 pounds of chromic oxide to constitute a unit) of contained chromic oxide (Cr_2O_3) in the ore dry basis. For any other minerals or metals found in or precious stones found in and mined and removed from said leased premises Lessee agrees to pay 10% of the net smelter or other returns for the minerals and in the case of precious stones 10% of the net sales return therefor. There shall be no royalty payable on any material used for back-filling or other mining purposes, or on any limestone used, nor shall any royalty be paid on any materials taken from the said leased premises used in connection with the development and operation of the mine and the construction and operation of the mill, or the construction and operation of any of the facilities used in connection with the operation of said leased premises. Provided, however, anything in this lease to the contrary notwithstanding, any and all royalty payable on products mined or produced from aforesaid quartz lode mining claims, Mountain View Chrome Co. #1 and Mountain View Chrome Co. #2, shall be paid to and deposited with a bank or trust company nominated by Lessee and satisfactory to Lessors to be held in trust by said bank or trust company pending full settlement of any and all disputes over title to said mining claims, and upon full settlement of such disputes to be paid

Exhibit A—(Continued)

by said bank or trust company to the person or persons, determined by law or agreement, to be entitled thereto. Any and all charges or fees of said bank or trust company arising out of such payment and deposit together with any and all taxes thereon, shall be deducted from the moneys so paid to and held on deposit by said bank or trust company, provided further, that upon payment of such royalties into said bank or trust company, [14] as above provided, the Lessee shall be relieved and discharged of any further obligation or liability in reference to said royalties or the distribution thereof among the persons entitled thereto; and provided, further, in the event of dispute respecting the mining claim or property from which any ore or product shall have been produced, mined or extracted, Metals Reserve Company, or any United States Government Agency assignee shall settle and determine any and all such dispute or disputes and such settlement and determination by Metals Reserve Company, or any United States Government Agency, Assignee, shall be final and conclusive.

4. For the purpose of convenience, each calendar year shall be divided into quarters. The first quarter shall be from January 1 to March 31, both dates inclusive; the second quarter shall be from April 1 to June 30, both dates inclusive; the third quarter shall be from July 1 to September 30, both dates inclusive, and the fourth quarter shall be from October 1 to December 31, both dates inclusive.

5. Except as otherwise provided in paragraph

Exhibit A—(Continued)

three herein above, Lessee shall pay all royalties due and payable hereunder in lawful money of the United States on the 30th day following each calendar quarter, which payment shall be deposited with The Yellowstone Bank at Columbus, Montana, to be paid by said Bank to May Paula Mouat, as Trustee. Lessee shall have the right to maintain a stock pile of chromite ore on or near the herein demised premises without paying royalties thereon until concentrated. All payments of royalty made shall be the amount due as royalties, less taxes on such royalties which the smelter or Lessee is by law obligated to deduct from same.

6. Lessee agrees to make, or cause to be made, a fair estimate of the number of tons of ore mined from the said leased premises, and to make, or cause to be made a record of the disposition of same in the tonnage stockpiled, sold or shipped or permitted to be shipped without concentration, and to make or cause to be made, an accurate assay of the heads of such ore going into said mill for concentration, to accurately weigh, or cause to be weighed, the number of tons of chromite concentrates produced from said leased premises, and to make or cause to be made an accurate assay of the average samples of all such chromite concentrates produced and to make or cause to be made an accurate assay of the tailings resulting from the production of such concentrates, and to make, or cause to be made an accurate record of all the aforesaid weights and assays.

Exhibit A—(Continued)

Lessee, at the time of making payments for royalties, shall at the same time render and transmit to the Lessors a true and exact copy of all of the aforesaid estimates, weights, and assays verified after audit by a responsible officer or representative of the Lessee, in duplicate, and true copies of the smelter or other returns for other minerals and precious stones mined or removed from said leased premises. The right is reserved by the Lessors, and conceded by the Lessee, to inspect, review and test the correctness of the scales used in weighing ores and concentrates and to assay said ore, concentrates and tailings at any time, and in such manner as the Lessors may elect, but not in such manner that it will interfere with the operations of Lessee, it being understood that any errors in these respects, when established, shall be corrected in the accounts of the parties hereto.

7. Beginning January 1, 1943, and thereafter during the term of this lease, Lessee agrees to pay to and deposit with The Yellowstone Bank at Columbus, Montana, to be paid by said Bank to May Paula Mouat, as Trustee, a minimum royalty of Ten Thousand Dollars (\$10,000.00) per year payable quarterly on or before thirty days after the end of each calendar quarter. In the event that the total royalties payable under Paragraph 3 hereof, (exclusive of royalties payable on products mined or produced from aforesaid Mountain View Chrome Co. #1 and Mountain View Chrome #2 mining claims

Exhibit A—(Continued)

and paid to a bank or trust company in trust as in said Paragraph 3 provided) during any calendar year shall equal or exceed Ten Thousand Dollars (\$10,000.00) this minimum royalty obligation shall be fully complied with. Royalty paid in any minimum royalty year in excess of Ten Thousand Dollars (\$10,000.00) cannot be credited to the payment of any royalty accruing in any other minimum royalty year but any royalty paid in any quarter of a minimum royalty year by reason of minimum royalty requirements which is in excess of the earned royalties for that quarter may be applied in payment of earned royalties in any other quarter of such minimum royalty year; provided, however, should Lessee's construction or development or mining or milling operations or any other operation hereunder be suspended because of any of the causes or reasons set forth in Paragraph 24 hereof Lessee's obligation to pay a minimum royalty as aforesaid shall be suspended during any and all periods where such causes or reasons exist and the obligation to pay such minimum royalty shall be reduced in such proportion as the period of suspension of operations bears to the entire calendar year.

8. From and after January 1, 1942, Lessee agrees to pay prior to delinquency all taxes, general and special, upon the lands and properties herein leased or held or used under the terms of this Lease and the improvements thereon and on the ore and/or concentrates produced therefrom,

Exhibit A—(Continued)

including the metal mines tax, license taxes, and any and all other taxes that may be levied against said mines and all properties herein leased or held or used under the terms hereof, and on the products produced therefrom whether it be ore or products of ore, by virtue of any law now existing, or which may hereafter be enacted by the Government of the United States or the State of Montana, except the Lessors shall pay all taxes assessed and levied on their royalty.

9. Lessee agrees to carry on its operations hereunder, diligently and in a good, efficient and miner-like manner and in accordance with accepted mining practices in the State of Montana, and Lessee agrees that all mining operations shall be carried on in a systematic, orderly and economical manner so as to realize in so far as is practicable, the full ore resources of the leased premises. Lessee shall have the option, upon one month's notice to Lessors, of electing to abandon any specified area and may so abandon, leaving to Lessors the option of maintaining the timbering and trackage of said area at Lessors' own expense and without interfering with the operation of Lessee.

10. The representatives of the Lessors shall have free access to the premises and to Lessee's mill for the purpose of inspecting, sampling and examining, and shall have the right to examine the records referred to in Paragraph 6 hereof, but without interfering with or hindering the operations of the Les-

Exhibit A—(Continued)

see; provided, however, that Lessors shall carry or cause to be carried workmen's compensation insurance on their employees to be effective at all times when such employees are on said leased premises or any other premises of Lessee. Lessee shall keep or cause to be kept accurate maps of the mine workings in plan and longitudinal sections showing all working and the areas stoped out, together with accurate record of all samples taken (with description of location, and assay content of each) from ore, concentrates and tailings; such maps and sample records to be available [16] to Lessors' representatives for examination and copying.

11. Lessee shall assume all responsibility for its operations and shall save Lessors harmless for damages caused by Lessee, its employees, or contractors to the persons or property of others, except to the persons or property of employees of Lessors. The Lessee shall carry at its own expense or cause to be carried without cost to Lessors workmen's compensation insurance on its employees who are covered by the Workmen's Compensation Law of the State of Montana or Lessee shall make other arrangements for workmen's compensation as may be permitted by such law.

12. Lessee agrees to furnish at its own cost and expense or cause to be furnished without cost to Lessors ,all labor, materials and supplies necessary for the operation of the hereinabove described leased property during the term of this lease except

Exhibit A—(Continued)

for materials taken from the said leased property hereinabove mentioned that may be used without pay, and to fully pay when due for all machinery, equipment and materials joined or affixed to the hereinabove described property, and to pay in full when due all persons who perform labor upon the hereinabove described leased property, and agrees that it will defend the said leased property and save Lessors harmless against all liens of any kind or nature placed on said leased property for any work done or machinery, equipment or materials furnished thereon during the term of this Lease provided Lessee shall not be held responsible for any liens created by Lessors on the said demised premises.

13. Lessors shall have no right to cancel or terminate this Lease except by reason of the failure of Lessee to pay taxes or royalties. If dispute arises as to the amount due and payable for royalties by Lessee, the amount not in dispute shall be paid and the disputed amount shall be determined with all due diligence, and on final determination shall be promptly paid, or default shall be deemed to have been made. If default is made in the payment in any of the aforesaid obligations of Lessee, then Lessors may serve notice on Lessee demanding that payment be made within thirty days, and if payment is not made and the default remedied within thirty days after receipt of said notice by Lessee, Lessors may forthwith declare this lease terminated and ended and the Lessors shall then

Exhibit A—(Continued)

be entitled immediately to re-enter and take possession of the demised premises and Lessee shall, nevertheless, make and comply with all obligations and payment for the maintenance of the demised premises and possessory rights, claims and permits up to the said time of re-entry by Lessors, as is provided by Paragraph 15 hereof.

14. The Lessee may at any time, after January 1, 1942, on ninety days' notice to Lessors and by the payment of the sum of One Thousand Dollars (\$1,000.00), surrender and terminate this Lease, provided that, promptly after such termination, Lessee shall pay all royalties, if any, accrued up to the effective date of such termination, any guaranteed minimum royalty payable to be pro-rated up to the date of such termination and no royalties shall accrue after the date of such termination, said payments to be made to The Yellowstone Bank, Columbus, Montana, and to be paid by said Bank to aforesaid Trustee.

15. Upon the termination of this Lease by either party, Lessee shall surrender peaceably the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and the Lessors shall have the right to re-enter upon said leased premises owned by them and appurtenances and take full and complete possession of the whole thereof. Upon the expiration of this Lease or the termination of

Exhibit A—(Continued)

this Lease for any reason by [17] either party, Lessee shall have six (6) months' additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises and ore on dumps upon which royalties have not been paid.

16. When this Lease, for any cause, shall terminate, the Lessee shall deliver to Lessors a proper release or certificate of that fact, duly executed and acknowledged, and Lessors, upon such termination, and after compliance with all of the terms, covenants and conditions of this Lease, shall execute and deliver to Lessee a release and discharge from all further liability hereunder.

17. Time is of the essence of this Agreement and all of the grants, terms and covenants, stipulations and conditions expressed herein shall run with the land and in all respects shall extend to and be binding upon the successors and assigns of the parties hereto.

18. It is mutually agreed that this Lease is a Montana contract and shall be interpreted and construed under and by the laws of the State of Montana.

19. It is agreed that wherever the words "chromic oxide" are used herein they shall be construed

Exhibit A—(Continued)

to mean chromium sesquioxide, the chemical symbol for which is Cr_2O_3 .

20. Lessee agrees with the Lessors that unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased upon the termination hereof, for a period of more than six months after such termination, shall conclusively be deemed to have been abandoned by the Lessee in favor of the Lessors.

21. Nothing herein contained shall restrict or be deemed to restrict the right of Lessee to assign this Lease.

22. Promptly upon receipt of Lessee's written request, Lessors will execute and deliver to Lessee a quit claim deed to all of Lessors' right, title and interest in and to property not to exceed 200 acres, to be designated by Lessee for use by Lessee for millsites, townsites, stock piling and tailings disposal.

23. It is expressly agreed that Lessee may use its plant facilities for the smelting, beneficiating, concentrating and milling of chromite ore or any other ore, metal, mineral or material produced from mining properties other than the premises covered by this Lease without payments of any royalty to the Lessors.

24. Anything in this Lease contained to the contrary notwithstanding, any strike, lockout, difference with workmen, accident, fire, explosion, flood,

Exhibit A—(Continued)

earthquake, embargo, mobilization, war, foreign war, hostility, riot, requirement, regulation, restriction or other act of any government or governments, whether legal or otherwise, acts of public enemies, the elements, force majeure, inability to secure or delay in securing cars, labor, raw materials, fuel or other supplies or material or electric power necessary for the operation of the leased premises or the operation of Lessee's facilities, failure of the ore supply or loss of the ore body in the said leased premises or inability to secure sufficient ore of the grade required for concentrating from the said leased premises, unforeseen metallurgical or milling delays, delays or interruptions [18] in transportation by rail, water or otherwise, damage to or destruction of such mines or plants or other operating facilities and any other contingency, whether or not of the nature or character hereinbefore specifically enumerated, which is beyond the control of Lessee or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist.

25. Any notice herein mentioned to be given by the Lessee to the Lessors shall be sent by registered mail addressed to the Lessors at Columbus, Montana. Any notice herein mentioned to be given by the Lessors to the Lessee shall be in writing and shall be sent by registered mail to the office of the Lessee at 811 Vermont Avenue, Northwest, Washington, D. C.

Exhibit A—(Continued)

26. This lease is executed in duplicate, either counterpart of which, for all purposes, may be used as an original.

27. However, should the exploration work now being done on the leased properties by the United States Bureau of Mines reveal nickel ore bodies of commercial value and should the Lessee decide not to mine such nickel ores, and pay royalties as set forth in Paragraph 3, then Lessors shall have the right to mine or assign the right to mine such nickel ores, provided, however, that such mining does not in any way interfere with the Lessee's mining, milling or smelting operations of any other ores under this Lease. Provided, further, that Lessee has the exclusive right to mine all chrome ores, and in case of dispute as to whether the ore is chrome or nickel it is expressly agreed that such disputed ore shall be for the purpose this Lease considered chrome ore.

28. Lessee, or its assigns, may renew this lease for an additional period of ten (10) years upon the same terms and conditions, by giving Lessors notice in writing at least thirty (30) days prior to the expiration of this Lease.

29. Lessee may at any time during the existence of this agreement do any exploration work Lessee deems necessary, provided that any ore extracted before the payment of the advance royalty set forth in Paragraph 2 must not be removed from the

Exhibit A—(Continued)

property, except such ores that must necessarily be removed from the property for sampling and mill testing.

30. If Lessee fails to pay the advance royalty provided for in Paragraph 2 of the Agreement then this Lease Agreement is automatically terminated and at an end, and Lessors and Lessee relieved from any and all obligations or liabilities under this Agreement.

31. Lessors warrant their title to and will defend the Lessee in the quiet and peaceful possession of said premises and mining claims against all persons, except that Lessors make no warranty as to their title to mining claims Mountain View Chrome Co. No. 1, Mountain View Chrome Co. No. 2 and the two Smelter claims, and will pay any and all liens now on any and all said leased premises and any and all taxes which accrued or were payable prior to January 1, 1942, and in the event that Lessors shall fail to pay said liens or taxes, the Lessee may pay the same and shall have a lien on the rents and royalties for reimbursement.

In Witness Whereof, Lessors have hereunto set their hands and seals and the Lessee has caused these presents to be executed by its officers thereunto duly authorized and its seal affixed hereto the day and year hereinabove first written.

Exhibit A—(Continued)

/s/ MAY PAULA MOUAT,

/s/ M. W. MOUAT. [19]

/s/ MAY PAULA MOUAT,

Trustee.

Lessors:

METAL RESERVE COMPANY,

A Corporation.

By /s/ G. TEMPLE BRIDGMAN,

Vice President.

Lessee:

[Corporate Seal]

Attest:

/s/ M. C. MULLIGAN,

Its Secretary.

State of Montana,

County of Stillwater—ss.

On this 20th day of December, 1941, before me, the undersigned, a Notary Public in and for the State of Montana, personally appeared May Paula Mouat, known to me to be the person whose name is subscribed to the within and foregoing instrument as an individual and as Trustee, and acknowledged to me that she executed the same as an individual and as Trustee.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

[Seal] /s/ H. L. MYERS,

Notary Public for the State of Montana, Residing
at Billings, Montana.

My Commission expires Febr. 4, 1944.

Exhibit A—(Continued)

State of Montana,
County of Stillwater—ss.

On this 20th day of December, in the year 1941, before me, H. L. Myers, a Notary Public in and for the State of Montana, personally appeared M. W. Mouat, known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

[Seal] /s/ H. L. MYERS,
Notary Public for the State of Montana, Residing
at Billings, Montana.

My Commission expires Febr. 4, 1944. [20]

District of Columbia—ss.

On this 12th day of January, 1942, before me, Charles J. Buettner, a Notary Public in and for the District of Columbia, personally appeared G. Temple Bridgman, personally known to me to be the Vice President of Metals Reserve Company, the corporation that executed the within and foregoing instrument and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate above written.

[Seal] /s/ CHARLES J. BUETTNER,
Notary Public for the District
of Columbia.

My Commission expires Mar. 14, 1946.

[Endorsed]: Filed Sept. 17, 1946. [21]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant, War Assets Administration, an agency of the United States Government, and appearing specially moves this Honorable Court to dismiss the plaintiffs' complaint on file herein as to the War Assets Administration, an agency of the United States of America, upon the grounds and reasons therefore as follows:

I.

That the War Assets Administration is only an executive agency of the United States, and is not subject to suit.

JOHN B. TANSIL,
Attorney of the United States, in and for the District of Montana.

MERLE C. GROENE,
Assistant Attorney of the United States, in and for the District of Montana, Attorneys for the Defendant.

[Endorsed]: Filed Nov. 12, 1946. [23]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, RECONSTRUCTION
FINANCE CORPORATION

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

I.

Defendant admits the allegations in paragraph I of the complaint.

II.

Defendant admits the War Assets Administration is an executive agency of the United States established under Executive Order No. 9689, dated January 31, 1946. Defendant denies that War Assets Administration is an agency or branch of the Reconstruction Finance Corporation.

III.

Defendant admits the allegations in paragraph III of the complaint. Defendant says that Metals Reserve Company was a corporation created by defendant on June 28, 1940, pursuant to section 5(d) of the Reconstruction Finance Corporation Act as amended, 47 Stat. 5, to aid in the national defense program.

IV.

Defendant admits that plaintiff, May Paula Mouat, was at one time named a trustee of an ex-

press trust for the benefit [25] of certain mining claimants but defendant is without information sufficient to form a belief with respect to the present existence of said trust or the exact beneficiaries.

V.

Defendant admits the allegations in paragraph V of the complaint.

VI.

Defendant admits the allegations in paragraph VI of the complaint.

VII.

Defendant admits that by Act of Congress dated June 30, 1945, 59 Stat. 310, Metals Reserve Company was dissolved and all of its assets, duties, liabilities, etc., were transferred to Reconstruction Finance Corporation. Defendant says that the extent of its liability on the matters involved in the lease referred to in the complaint is a question of law.

VIII.

Defendant denies that War Assets Administration is an agency of Reconstruction Finance Corporation. Defendant says that the remaining allegations in paragraph VIII of the complaint are conclusions of law.

IX.

Defendant admits the allegations in paragraph IX of the complaint. Defendant alleges that the sum of \$1,000 was duly deposited in the Yellowstone Bank, Columbus, Montana, for the benefit of Mrs. May Paula Mouat, Trustee, in accord-

ance with the provisions of paragraph 14 of the lease.

X.

Defendant denies the allegations in paragraph X of the complaint. Defendant alleges that all minimum royalties or other royalties that accrued under the lease have been paid as follows:

(a) On January 23, 1942, Metals Reserve Company paid to the Yellowstone Bank of Columbus, Montana, to the credit of May Paula Mouat, Trustee, the sum of \$10,000 as an advance royalty pursuant to [26] paragraph 2 of the lease;

(b) As a result of mining and milling activities during the year 1943, prior to suspension thereof by order of the War Production Board, the sum of \$40,920.21 in earned royalties was paid as provided under the terms of the lease. Of the total amount paid, the sum of \$19,428.92 was paid by reason of production from claims included in the lease other than Mountain View Chrome No. 1 and 2. Said sum of \$19,428.92, less the sum of \$969.50 paid for taxes, was deposited in the Yellowstone Bank at Columbus, Montana, for the benefit of May Paula Mouat, Trustee, as provided for in paragraph 7 of the lease. Defendant alleges that no minimum royalties, as such, were required for the year 1943 since the earned royalties paid exceeded the minimum amount.

Defendant alleges that, as provided in paragraphs 7 and 24 of said lease, the obligation to pay a minimum royalty terminated after production was

stopped in the fall of 1943, upon direction of the War Production Board. Defendant further alleges that at all times pertinent hereto, and particularly in the year 1943, the economy of the nation was placed under the direction of the War Production Board, with authority in that Board to direct war procurement and production, including the authority to direct the acceleration or suspension of raw material production by other federal departments, establishments or agencies.

Defendant alleges that acting pursuant to its broad wartime powers, the War Production Board, in September, 1943, directed Metals Reserve Company to suspend operations on the leased premises. Defendant further alleges that said direction was a requirement, restriction and act of the Government and a contingency beyond the control of the lessee, which, under the terms of said lease, terminated the obligation to pay minimum royalties. Defendant further alleges that although production was ordered suspended, the War Production Board directed that the mine and mill be kept in standby condition pending the uncertain requirements of wartime needs.

Although the physical facilities and equipment owned and constructed by Defense Plant Corporation on the leased premises were released by the War Production Board in April, 1945, and thereafter [27] declared surplus, it was not until November, 1945, that the War Production Board authorized cancellation of the lease made by Metals

Reserve Corporation. Defendant thereafter terminated the lease, as set out in the complaint. Defendant alleges that at no time during the existence of said lease was it permitted to resume mining operations.

XI.

Defendant admits it has not executed a release or certificate of termination. Defendant denies that plaintiffs' title has been clouded thereby. Defendant alleges that by virtue of existing law, the structures and facilities on the leased premises have been declared surplus and, consequently, defendant cannot issue a release without interfering with the disposal agencies of the United States.

XII.

With respect to paragraph XII of the complaint, defendant admits the quotation from the lease. Defendant admits it has constructed a fence and kept guards at an entrance gate but alleges that said fence and gate are constructed on land owned by the United States and not on land covered by the lease. Defendant admits that in order to protect the government facilities involved a pass was required from all persons desiring to enter said gate but further alleges that plaintiff, M. W. Mouat, has at all times held a pass for entrance purposes.

Defendant alleges that in April, 1945, all Defense Plant Corporation (Plancor) structures, equipment and facilities on the leased property (but not the Metals Reserve Company lease itself) were released by the War Production Board and there-

after declared surplus, pursuant to the Act of October 3, 1944, 58 Stat. 766, 50 U.S.C., War Appendix, sec. 1611, et seq. Under Executive Order No. 9689, dated January 31, 1946, all functions and responsibilities with respect to surplus property were vested in the War Assets Administration as of March 25, 1946. By reason of existing law, said structures, equipment and facilities on the leased premises have been [28] subject to disposal as surplus property and defendant has taken no action which would interfere with their disposition in the manner required by law.

Defendant admits that on February 28, 1946, certain buildings and structures erected by Defense Plant Corporation were standing on the premises described in the lease. Defendant admits that certain plumbing equipment was removed from said buildings but alleges that removal was effected prior to six months from the time that the lease was terminated and that removal thereof was authorized by the terms of the lease.

Defendant denies each and every allegation in paragraph XII of the complaint not herein admitted.

XIII.

Defendant denies the allegations in paragraph XIII of the Complaint.

XIV.

Defendant admits that on February 28 and March 1, 1946, there remained on the premises certain personal property of the type described in the com-

plaint, which personal property was removed prior to August 28, 1946. Defendant denies that any materials so remaining were removed therefrom subsequent to August 28, 1946. Defendant denies plaintiffs are entitled to an account and denies each and every allegation in paragraph XIV of the complaint not herein specifically admitted, except the quotation from the lease.

Third Defense

Defendant alleges that all minimum royalty payments required under the terms of said lease have been paid. Defendant herein re-alleges the allegations appearing in paragraph X of the second defense.

Fourth Defense

Defendant alleges that plaintiffs at no time had acquired any right, title or possessory interest in that tract of land described in the lease as an unpatented mining claim known as "Lake Placer," with certificate dated July 16, 1940, recorded [29] in Book 23 Misc., page 400, and amended June 16, 1941, 24 Misc. 155. Defendant alleges that as to the area included in said Lake Placer claim, there has been a failure of consideration and that the terms of said lease are not applicable to any of the structures or facilities erected thereon.

Fifth Defense

Defendant alleges that plaintiffs breached said lease by failing and refusing to deliver the quit-claim deed to 200 acres of land, at lessee's written request, for use by the lessee for mill sites, town sites, stockpilings and tailings disposal.

Whereof, defendant, Reconstruction Finance Corporation, prays that the complaint be dismissed and that it be awarded its costs.

JOHN B. TANSIL,

U. S. Attorney.

MERLE C. GROENE,

Assistant U. S. Attorney,

Attorneys for Defendant Reconstruction Finance Corporation.

Service of the within admitted and a copy had, this 25th day of November, 1946.

/s/ LOWNDES MAURY,

/s/ A. G. SHONE,

/s/ THOMAS C. COLTON,

By /s/ THOMAS C. COLTON,

Attorneys for Plaintiffs.

[Endorsed]: Filed Nov. 26, 1946. [30]

In the District Court of the United States in and
for the District of Montana

No. 871

MAY PAULA MOUAT, et al.

vs.

RECONSTRUCTION FINANCE CORPORATION, et al.

ORDER GRANTING MOTION OF WAR ASSETS ADMINISTRATION TO DISMISS COMPLAINT.

Herein, it is ordered that the motion of War Assets Administration to dismiss the complaint

herein as to it, be and is granted, and the cause as to said War Assets Administration be and is dismissed.

Thereupon Court ordered that the cause as to Reconstruction Finance Corporation be and is set for trial here on November 12, 1947, at 10:00 A.M.

Entered in open Court at Billings, Montana, October 27, 1947.

H. H. WALKER,
Clerk. [32]

In the District Court of the United States, in and
for the District of Montana, Billings Division
Civil Action No. 871

MAY PAULA MOUAT, et al.,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, et al.,

Defendants.

Before: Honorable Charles N. Pray,
United States District Judge, at Billings,
Montana, November 12, 13 and 14, 1947.

APPEARANCES

For Plaintiffs:

MR. H. L. MAURY and

MR. A. G. SHONE,

Attorneys at Law,

MR. THOMAS C. COLTON,

Attorney at Law.

For Defendants:

MR. THOMAS L. McKEVITT,

Assistant U. S. Attorney General,

MR. WILLIAM T. LENNON,

Assistant General Counsel, War Assets Administration,

MR. FRANKLIN A. LAMB,

Assistant U. S. Attorney, District of Montana. [35]

PROCEEDINGS

Be It Remembered That this cause came on regularly for hearing in the United States District Court, in the Federal Building, at Billings, Montana, on Wednesday, November 12, 1947, and concluded on November 14, 1947, before the Honorable Charles N. Pray, Judge presiding, sitting without a jury.

Whereupon the following proceedings were had and done, to wit:

The Court: Gentlemen, are you ready to proceed with the case of May Paula Mouat, et al., vs. Reconstruction Finance Corporation, et. al.?

Mr. Lamb: If the court please, at this time I would like to introduce and move the admission for the purpose of this particular case Mr. Thomas L. McKevitt of the United States Attorney General's office in Washington.

The Court: Very well.

Mr. Lamb: And may the record show he is admitted to practice for the purpose of this particular action?

The Court: Certainly.

Mr. Lamb: And I would also like to move the admission and introduce Mr. Lennon, Assistant Chief Counsel of the War Assets Administration, Washington, D. C., for the purpose of this case.

The Court: Very well, he may be admitted for the purpose of this case. [39]

Mr. Maury: This cause is at issue as to Reconstruction Finance Corporation.

Mr. McKevitt: If the court please, I think it probably would be well to dispose of the pending motion and dismiss War Assets as a defendant. I think it would clarify the situation if we took that up first, that motion that has been pending for some time in this court.

Mr. Lamb: Your Honor, I know I brought the matter up at one time. There is a minute entry. I am sorry I didn't get that minute entry.

The Court: It has already been disposed of, has it?

Mr. H. H. Walker, Clerk: Yes, your Honor.

The Court: Yes, I thought so.

Mr. Maury: May I open briefly to explain what the case is about?

The Court: Yes.

Mr. Maury made an oral statement to the court.

Mr. McKevitt: Your Honor, I would like to present our version of the case in its entirety at this point.

The Court: Very well.

Mr. McKevitt made an oral statement to the court.

The Court: Are you ready to introduce testimony? [40]

Mr. Maury: We are ready if the court says so.

Mr. McKevitt: We are ready, sir.

The Court: I think we better start in the morning.

Mr. Maury: I think so, your Honor.

The Court: We will adjourn at this time until 10:00 o'clock tomorrow morning. (5:10 P.M.)

Pursuant to adjournment, the Court convened at 10:00 o'clock A.M. on November 13, 1947, at which time all parties and counsel were present.

The Court: Proceed.

Mr. Maury: Mrs. Mouat.

Mr. McKevitt: There was one issue in the case with respect to the payment of the money for 1943, 1942 and 1943. I have the bank President under subpoena to bring their records and I wanted to make sure before letting him go. Can we stipulate right here that issue is out of the case?

Mr. Maury: Certainly. It will be testified about in two minutes.

Mr. Shone: Royalty for 1942 and 1943; the payment of royalties has been paid.

Mr. McKevitt: That is stipulated.

The Court: Very well. [41]

MRS. MAY PAULA MOUAT

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. Mrs. Mouat, you are Mrs. May Paula Mouat?

(Testimony of Mrs. May Paula Mouat.)

A. Yes, sir.

Q. And the wife of M. W. Mouat?

A. Yes, sir.

Q. You are one of the plaintiffs as trustee in this case? A. Yes, sir.

Q. Mrs. Mouat, under the lease there was a provision for the payment of \$10,000. a year minimum royalty; that royalty was paid for 1942?

A. Yes, sir.

Q. And was it paid for 1943? A. No.

Mr. Maury: I think you are mistaken.

Q. Was it paid for 1943 by deposit in the Yellowstone Bank of the proceeds of ore?

A. There was some payment the first part of 1943.

Mr. Maury: I think you have gotten the years wrong, Mrs. Mouat.

Q. There were two years' royalty paid, minimum royalty? A. Yes, sir. [42]

Q. The first when the lease was signed?

A. Well not until the next year.

Q. What?

A. The next year. They didn't make their payment right away.

Q. You were thinking of a prior lease but I am talking about this lease of December 15th, the one here. Was the royalty, the \$10,000. paid about the time that lease was signed?

A. I don't understand.

Q. That lease was signed in 1941, the last part of the year? A. Yes.

(Testimony of Mrs. May Paula Mouat.)

Q. And there was \$10,000 paid then or about the 1st of January? A. Yes.

Q. About the 1st of January? A. Yes.

Q. And that paid the rent for 1942, did it not?

A. 1942.

Q. Then when it came to 1943 there were deposits made in the Yellowstone Bank from the proceeds of ore more than equal to the \$10,000. for 1943?

A. Yes.

Q. For 1943? A. Yes.

Q. Now since then except for a payment of \$10,000. has there been any rent or royalty at all paid on the land? A. No, sir. [43]

Q. You did get a check for \$1,000? A. Yes.

Q. In the latter part of 1945? A. Yes.

Q. And nothing else has been paid?

A. No, sir.

Q. Mrs. Mouat, how long have you lived at your present residence up on the Stillwater and close to the land in the lease?

A. For all of thirty years.

Q. And you were acquainted and familiar with the land that was in this lease in a general way?

A. Yes, sir.

Q. About a year and a month ago did you wish to visit the upper portion of the land here with some friends? A. Yes, sir.

Q. And how would that be reached from your house down on the Stillwater? How would you get there? R. Right down the main road.

(Testimony of Mrs. May Paula Mouat.)

Q. Right up the main road? A. Yes.

Mr. McKevitt: Could you get that date more exactly rather than about a year and a half?

Mr. Maury: No, I said about a year and a month ago. [44]

Q. That would be about a year and a month ago?

A. Yes.

Q. And how were you travelling?

A. We went in a car.

Q. And you entered, having a gate down there near the mill? A. Yes, sir.

Q. And how did you travel, around the boulevard that has been built up there? A. Yes.

Q. And were you anxious to visit the land up around there above what is called the town of Mouat? A. Yes, sir.

Q. And when you got to a point in the so-called town of Mouat what obstructed your way?

A. They had a chain across the road so we couldn't get up to tunnel five.

Q. You wanted to go to tunnel five?

A. Yes, sir.

Q. How was that chain fastened?

A. Well it was locked.

Q. Was there a gate on another place located on the road before you got to that point? A. No.

Q. And before you got to the land there or do you remember? [45]

A. No, I think not. I think that was the only gate.

(Testimony of Mrs. May Paula Mouat.)

Q. Only gate that was located——

A. After we passed the guard gate.

Q. What have you to say as to whether that was, through that gate was the only way that a vehicle could get to the upper portion of the land?

A. Yes, sir.

Q. That is the only way? A. Only way.

Q. Now you are named in the complaint as a trustee of certain people who signed a declaration of trust some years ago? A. Yes, sir.

Q. Has there ever been any change in that trust?

A. No.

Q. None whatever? A. No.

Mr. Maury: Cross-examine.

Cross-Examination

By Mr. McKevitt:

Q. Mrs. Mouat, you testified that you have lived in this area some thirty years. Could you point out approximately for the court where you lived? This is down about where the [46] mill is? A. Yes.

Q. Down in this general area?

A. Yes, it must be down there.

Mr. Maury: There is one little phase if you will pardon me.

Direct Examination

(Continued)

By Mr. Maury:

Q. Mrs. Mouat, on the afternoon of August 28th, 1946, that was last year, did you go to the gate down there by the mill? A. Yes.

(Testimony of Mrs. May Paula Mouat.)

Mr. McKevitt: To which we object, your Honor, for the reason any testimony pertaining to any date subsequent to August 28th, 1946, would be such time when the Reconstruction Finance Corporation, the only defendant remaining in this case, had no control or possession of this particular property.

The Court: You said on that date?

Mr. Maury: Yes.

The Court: Did you say on that date?

Mr. Maury: Yes, on August 28th, 1946.

The Court: That would not be subsequent to the date. Proceed. [47]

Q. (By Mr. Maury): Did you find there a watchman or guard?

A. Yes, they had a guard stationed there.

Q. And what if anything did you tell that watchman or guard?

A. Well I had my pass. See, we had to have a pass.

Q. You had to have a pass? A. Yes.

Q. And what did you tell him that day, do you remember? A. What, the 28th?

Q. Yes.

A. I told him that we were taking possession; their time was up.

Q. The next day or two did you see a notice posted there that referred to Bill Mouat?

A. Yes.

Mr. McKevitt: What is that date?

(Testimony of Mrs. May Paula Mouat.)

Mr. Maury: The next day or two of August 28th will be 28, 29th or 30th.

Q. (By Mr. Maury): Did you find a notice posted there that mentioned the name of Bill Mouat?

A. Yes, sir.

Q. And what did that notice say?

A. They would not let anyone—they said that he couldn't [48] go through with anything but a pickup and himself, not a man could go through, and the guards followed him when he did go through.

Q. You saw that notice there after the 28th?

A. Yes.

Q. Now you call your husband Malcolm but is he ordinarily known as Bill Mouat? A. Yes.

Q. And you knew to whom that notice referred?

A. Yes.

Mr. Maury: That is all.

Cross-Examination

(Continued)

By Mr. McKevitt:

Q. Mrs. Mouat, I believe that you pointed out before that your home is roughly in the location of the present—— A. Below the mill site.

Q. In other words, that is down off the mountain? I believe you testified you lived there about thirty years? A. Yes, sir.

Q. Now prior to the execution of this lease in 1941 did you ever have occasion to go up into the mountains to make any locations?

A. Prior to what? [49]

(Testimony of Mrs. May Paula Mouat.)

Q. Prior to 1941? Prior to the date this lease was executed?

A. Oh, yes, I went around surveying when we first came up there and we were both young and I put on riding breeches and surveyed with my husband.

Q. How did you get up in the mountains to the present location of the mine?

A. We walked.

Q. Was there a road?

A. Well there was a trail being a road but we did all of our stuff walking.

Q. In other words, is that road you used in those days still existent?

A. No, they have messed it up. They have gone just where they wanted to regardless where our road was.

Q. But the road is still there, that old road?

A. Yes.

Q. And it isn't that old road you saw this chain on? A. What?

Q. This chain is not on the old road?

A. No.

Q. It is on the new road the Government built, is that right? A. Yes.

Q. That is the only place where you saw this chain? [50] A. Yes.

Q. Now you testified I believe it was practically a year and a month ago that you made this one visit to the mine?

(Testimony of Mrs. May Paula Mouat.)

A. Oh, yes, I went up there several times.

Q. Well your testimony is just as to one?

A. Yes.

Q. Now you testified I believe—let's first say the day that you made that trip how did you get on to the premises to begin with?

A. We went through guard gate No. 1.

Q. You had a pass, Mrs. Mouat? A. Yes.

Q. You have always had a pass?

A. We always had a pass to go over our own stuff.

Q. And your husband has a pass? A. Yes.

Q. And one to go over the new road the Government built? A. Yes.

Q. So you entered across this Government property at the mine?

Mr. Maury: We object. Whether it is Government property or not that is a legal question.

Mr. McKevitt: Your Honor, I think, and I think the court will take judicial notice there was judicial taking of land. [51]

Mr. Maury: I don't think the court will take judicial notice of another case.

The Court: We can't settle that point of law right now but we will note it in the record.

Q. (By Mr. McKevitt): Now you proceeded from where, Mrs. Mouat?

The Court: What do you mean to say, the property under the lease? You are talking about the leased property?

(Testimony of Mrs. May Paula Mouat.)

Mr. McKevitt: Yes, your Honor.

The Court: Part of the leased property?

Mr. McKevitt: Part of the leased property we subsequently condemned although it was in the original lease.

Mr. Maury: I doubt if any part of the leased property was condemned.

Mr. McKevitt: It is unimportant to my point here.

Mr. Maury: We have outlined and this map will be identified when the witness gets on the stand, what it is. Mr. Colton and I will explain it to Mr. McKevitt now.

Q. (By Mr. McKevitt): I simply want to ask you at what time when you left this point—when you came across the chain what time of the day was it? A. Well sometime in the afternoon.

Q. About what time in the afternoon?

A. About three or four.

Q. Pretty late; about four thirty?

A. No, it wasn't that late.

Q. Was it a week day or Sunday?

A. Week day.

Q. But rather late in the afternoon?

A. About three o'clock, shortly after lunch.

Q. Was the chain the type that was, that you couldn't actually get by physically?

A. Yes, sir, it was a very heavy chain.

Q. Now at the same time, of course, up above where this road leads to are these valuable mining

(Testimony of Mrs. May Paula Mouat.)

buildings that have been placed on this property and this chain down here would in addition to keeping you off would keep any other trespassers from coming on to your own property, wouldn't it?

A. Well, yes, but they were stopped at this first gate, those that had no business there.

Q. Couldn't they come in this other way you always came in?

A. They were stopped at the guard gate.

Q. That would be an advantage to you to have this chain here?

A. No, not that chain because that really had nothing to—well, we couldn't get through either.

Q. Meaning somebody else couldn't get through there either? A. No.

Mr. McKevitt: That is all.

Mr. Maury: That is all.

MALCOLM WILLIAM MOUAT

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. Mr. Mouat, you may state your name.

A. Malcolm William Mouat.

Q. You are called by your friends William or Bill Mouat? A. Mostly Bill.

Q. Mostly Bill. Mr. Mouat, you are one of the parties to this lease as lessor? A. Yes, sir.

(Testimony of Malcolm William Mouat.)

Q. Mr. Mouat, have you prepared this map here?

Mr. Maury: It is for illustrative purposes only, your Honor.

Q. Did you prepare that from another map?

A. Yes, sir.

Q. Did you do the coloring on it?

A. Yes, sir. [54]

Q. And was it another map procured from some source? A. Yes, sir.

Q. Had it been used and found to be correct in general? A. I have surveyed a lot, yes.

Q. Did you help survey it? A. Yes.

Q. What does the green coloring represent on this map?

A. Unpatented ground, mining claims, placer and lode claims.

Q. What does the red, or whatever the color is represent?

A. United States patented lode claims.

Q. And can you point out—or first does it show clearly the Lake Placer as it existed on December 15, 1941? Did you hear me? If you don't hear me, you tell me. A. That is very close.

Mr. Maury: We offer this for illustrative purposes.

Mr. McKevitt: Your Honor, I feel we need a map too. Technically as to the exact location of that last question because the placer would cover

(Testimony of Malcolm William Mouat.)

a number of other locations I didn't get this to mean the entire yellow was placer.

Mr. Maury: I thought it was green.

Mr. McKevitt: In other words, the yellow is a group of placer claims? [55]

Mr. Maury: Yes.

The Court: What do you call the other color, purple?

Mr. Maury: I call it to be red but I don't know.

The Court: Well we can call it yellow and red.

Mr. Maury: Yes, yellow and red.

Mr. Maury: We offer it for illustrative purposes.

Mr. McKevitt: We have practically the same map.

The Court: Very well, then there isn't any objection?

Mr. McKevitt: No.

The Court: Very well, it may be received.

(Whereupon said Plaintiff's Exhibit No. 1, being a map, offered and received in evidence, is a part of this record.) [56]

Q. (By Mr. Maury): Mr. Mouat, I want you to explain and point out to the court—here is a pointer—I want you to explain and point out to the court here where you live, where the gate on the so-called mill property is, where the road leads up to the Lake Placer, where it leads on beyond the Lake Placer up the hill. Point it out on the Exhibit 1 there.

(Testimony of Malcolm William Mouat.)

A. Well, the first, this is where I live.

Q. Where your residence is?

A. Right in there.

Q. And where about is the gate to the property?

A. Right about there.

Mr. McKevitt: Can you translate that into the record so the record will show where he is pointing on the map.

Mr. Maury: We will mark it.

Q. Where is your residence?

A. Right there.

Q. "Residence" I am marking. And I will mark it "gate" there. A. Yes.

Q. Now where does the road go? Is it outlined on the map?

A. It is on survey around here. Around there this is on the old smelter site away around there; that was cut off and [57] comes in there. Up there another gate there.

Q. Now where was the other gate?

A. Right about there.

Q. All right, I will mark "gate" here. What ground is that gate on?

A. Lake Placer. And on north of that was another chain.

Q. Right here was another gate?

A. Yes, about.

Mr. McKevitt: Gate or chain there, Mr. Mouat? Is there a chain there or gate there?

A. Chain with lock on it. At times locked. Then

(Testimony of Malcolm William Mouat.)

the road continues around here and up here and here is the so-called tunnel 5. This road continued around here up to tunnel No. 2 right there.

Q. (By Mr. Maury): Now, Mr. Mouat, tell the court the difference in elevation between your house down on the Stillwater and the Mouat Camp on Lake Placer?

A. The elevation at our house is 5,000 feet; the elevation right here at this point——

Q. Now that is the other camp?

A. Is roughly 1900 feet higher.

Q. 1900 feet higher?

A. And from there to there is roughly 1700 feet.

Q. And what is the distance direct? [58]

A. It is a mile from there to down to this mill site.

Q. Mr. Mouat, do you recall about the first of September, 1946, seeking entrance at the lower gate with Mr. Colton, Mr. Shone and myself?

A. Yes, sir.

Q. What happened there?

A. Well I figured that I could——

Q. Not what you figured, just what happened there?

A. We were stopped by a guard. I had to phone to Columbus to Mr. Hunt.

Q. No, you didn't have to. What happened there?

Mr. McKevitt: I wish to object to any testimony

(Testimony of Malcolm William Mouat.)

as to September 1st, 1946, on the same ground Mr. Lamb mentioned before that the Reconstruction Finance Corporation is the only defendant here, and after the date mentioned this property had been turned over to the War Assets Administration.

Mr. Maury: We must take issue. We think you are a little in error. I believe on answer you said certain property had been turned over but not the lease, in your answer.

Mr. McKevitt: The lease?

Mr. Maury: But not the lease.

Mr. McKevitt: No, I didn't. You are confusing my answer. My point is anything that happened after September 1st, 1946, is not a matter for this defendant now before the [59] court; that any activities with respect to this property were acted on by the War Assets Administration not by the Reconstruction Finance Corporation.

Mr. Maury: You didn't do it in your answer?

The Court: Of course, I am not going to decide that matter now. We will take the testimony subject to your objection.

Q. (By Mr. Maury): What happened there?

A. I couldn't get my friends through that gate without considerable trouble an hour.

Q. How long did it take?

A. One hour or more.

Q. And then when you and your friends were admitted where did your party go?

(Testimony of Malcolm William Mouat.)

A. We went up through this road up to the Lake camp with the guard following us.

Q. How close was the guard?

A. Well when we stopped at one time I would say one hundred fifty feet back of us.

Q. And whenever you stopped with your party what did the guard do?

A. Seemingly stopped too.

Q. Did you go over the site of the buildings at that time with your party? A. Yes, sir. [60]

Q. And where was the guard when you were conducting your party over the site of those buildings?

A. Well there was several cars there; I couldn't say just where he was.

Mr. McKevitt: What buildings do you mean, Mr. Maury? I would like to have it clear to the court.

Mr. Maury: The buildings all over the Lake Placer there.

Mr. McKevitt: You mean all of these buildings?

Mr. Maury: Yes, we were walking around there, Mr. McKevitt.

Mr. McKevitt: You are not talking about the entire area in yellow and red on the map?

Mr. Maury: No, we couldn't get up to the other place. You don't know the country there.

Mr. McKevitt: That is what I am trying to get you down to what you are talking about.

Mr. Maury: Yes, I wish you had seen the country

(Testimony of Malcolm William Mouat.)

there and you would know you couldn't get up there at that time.

Mr. Maury: I will try to explain it to Mr. McKevitt.

Q. (By Mr. Maury): Mr. Mouat, there are certain outlines of structures on Exhibit 1. Can you tell the court if there is a plateau [61] at that point and kind of a bench, flat bench?

A. Well there is now.

Q. Was there at the time that we visited it?

A. Yes.

Q. And when you say you were walking around here, showing the houses here, you meant all of these houses? A. Yes.

Mr. McKevitt: That is what I wanted. We could perhaps save time by calling that the townsite area or some other area.

Mr. Maury: We will call it by the name you gave it, the Mouat town.

Mr. McKevitt: Who gave it?

Mr. Maury: Yes, you gave it that name. The people that got the lease gave it the name of Mouat.

Q. (By Mr. Maury): Mr. Mouat, can you tell how many structures were upon the Lake Placer at that time about the first week in September of 1946? A. Well we have another map there.

Q. You have another map which would indicate exactly? A. Absolutely.

Q. Is this the other map?

A. That is the other map.

(Testimony of Malcolm William Mouat.)

Q. And does this show the exact number of structures, [62] buildings that was upon the Lake Placer, excluding the second amendment, were upon the Lake Placer as it existed on the date of your lease?

A. That map is a copy of the company map.

Q. Is it a correct map showing number of buildings there?

A. Yes, as near as anyone can figure it out.

Mr. McKevitt: Your Honor, technically I don't think this witness is qualified but we can perhaps agree on that.

Mr. Maury: We can agree if you simply agree. We agree.

Mr. McKevitt: We have a map which I believe corresponds exactly and maybe we can get this straight now.

Mr. Maury: That is too big for our purpose. We would rather use our own.

Q. (By Mr. Maury): Mr. Mouat, is this a correct map of the number of buildings that were on the leased ground? A. Yes.

Q. And where is the dividing line here between the land that was in the lease and other land?

A. There it is as outlined.

Mr. McKevitt: Your Honor, I object to his ability actually to prove this map. [63]

Mr. McKevitt: If you take the map we have, we won't have any argument.

Q. (By Mr. Maury): Mr. Mouat, have you done surveying in that neighborhood?

(Testimony of Malcolm William Mouat.)

A. Yes, sir.

Q. And for how long?

A. Thirty years.

Q. And is that some every year?

A. Yes, sir.

Q. And do you know the boundaries of the various claims that you have located?

A. Yes, sir.

Q. And did you erect monuments there?

A. Yes, sir.

Q. Have you experience in surveying?

A. Forty years of it I could say.

Q. And are you a surveyor? I don't mean a graduate from any university.

A. I think I could do as good a job as most anybody.

Q. You have done that work? A. Yes.

Q. And repeatedly? A. Yes.

Q. And for years and years?

A. Yes, sir. [64]

The Court: Have you any further questions to ask as to the competency of the witness?

Mr. McKevitt: No, your Honor. The map is all right with me. I simply wanted his foundation of his knowing about it, but that map and our map is the same thing; so go on with the map. We have the map as illustrative and also for illustrative purposes.

Whereupon said Plaintiff's Exhibit No. 2, being

(Testimony of Malcolm William Mouat.)

map of townsite, offered and received in evidence, is a part of this record.

Q. (By Mr. Maury): Mr. Mouat, I call to your attention a black irregular line here and what does that line divide?

A. That line divides the original ground that the Government leased on the south side of this line right here is the original lease. That was an amended survey.

Q. Then the land in the original lease is bounded by a black line? A. Yes.

Mr. Maury: We will mark that black line "M," "N," "O," "P."

Q. To the left of that line as the map is now placed are the buildings that were on the Lake Placer as put in the lease?

A. What is that question.

Q. To the left as the map is placed now to the left are shown the buildings that were on the land when the lease was signed? [65]

Mr. McKevitt: That is not correct, when the lease was signed.

Mr. Maury: I did not mean that.

Q. The land as prescribed when the lease was signed?

A. Yes, the records will show.

Q. Now the number are correctly shown on that map?

A. It is tabulated right there on the map.

Q. Mr. Mouat, what kind of buildings were they?

(Testimony of Malcolm William Mouat.)

A. The houses or other buildings? You are talking of houses?

Q. Well first the residence houses?

A. About three types of houses.

Q. And of what were they constructed?

A. Cement abutments for the foundation and frame buildings.

Q. And what were the frames made of?

A. Wood, of course, and two by six's, two by four's.

Q. Of what were the floors constructed?

A. Well regular flooring.

Q. Well now is it wood or what?

A. Wood.

Q. And of what was the roof constructed?

A. Wood.

Q. Were all of the buildings there constructed of wood in the manner which you have described?

A. Yes, sir. [66]

Q. How were they we will say on March 1st, 1946, how were they arranged as to plumbing, as to wiring, and as to connection with sewer?

Mr. McKevitt: He hasn't testified yet he was up there on March 1st, 1936.

Mr. Maury: We are not talking about 1936; he was there in 1936, 1946.

Mr. McKevitt: He was just up there one day so far. I think he would have to say he was up and saw them.

Q. (By Mr. Maury): Had you been there frequently? A. Many many times.

(Testimony of Malcolm William Mouat.)

Q. And many times during summer and winter?

A. Yes, sir.

Q. While the construction was going on?

A. Yes, sir.

Q. Were you familiar with the general condition on March 1st of that property?

A. Just roughly of those houses.

Q. You saw them from the outside?

A. Yes.

Q. How were they plumbed?

A. Well they all had plumbing, some had baths, few showers and sinks. [67]

Q. (By Mr. McKevitt): You just testified you saw them from the outside on that date?

A. What is that?

Q. When was it you saw them on the outside?

A. Oh, I have been in them with friends many times in the interior.

Mr. Maury: Mr. McKevitt, we don't annoy people that way out in this country.

Q. (By Mr. Maury): Were they lighted?

A. Electric lighted, yes, sir.

Q. Were there sewer connections?

A. Yes, sir.

Q. And you may describe, in your own language you may describe what conditions those buildings were in on March 1st, 1946?

A. Well, of course, all buildings suffer in that kind of weather from deterioration, weather and so forth but the buildings were in good shape.

(Testimony of Malcolm William Mouat.)

Mr. McKevitt: I still say if the witness is going to be asked questions of a particular date, March 1st, 1946, he should show he was there on March 1st, 1946.

The Court: Well you can develop that on cross-examination. [68]

Witness: May I look up my diary to suit you?

Mr. Maury: We don't want to unduly delay matters, Mr. Mouat. We want to speed the case.

Q. (By Mr. Maury): Mr. Mouat, did you notice any change taking place in those buildings about the last week in August of 1946?

A. Yes, sir.

Q. What was happening to them?

A. Being torn down many of them, most of them.

Q. And what happened to the plumbing?

A. Well it seemingly was taken out as it was not there.

Q. And what had happened to the electric wiring?

A. Lots of that was destroyed, taken out, cut off and stored somewhere. I don't know where.

Q. What had happened to the sewer connections?

A. They had to be disconnected in order to move a house off.

Q. How many of the houses by August 28th had been demolished?

A. I think about that row was in the process of being demolished.

(Testimony of Malcolm William Mouat.)

Q. Now show which row was in the process of being demolished? A. On this row.

Q. Now by that row—— [69]

A. And some there.

Mr. Maury: I am marking the row.

Mr. Shone: Mr. Maury, the map is already marked with "C" for those demolished. Explain what the markings of the houses are.

Q. (By Mr. Maury): I will ask you if you mean the houses in the row to the right hand side of First Street west? You see the words "First Street west"? A. Yes.

Q. And by that row you mean?

A. The C's to the west.

Q. No, that is to the east, but it is to the right hand side of First Street west?

A. Yes, that is marked there on that schedule.

Q. About March the 11th, 1946, did you complain by telegram or letter to the Reconstruction Finance Corporation about the proposed demolition of those houses? A. Yes, sir.

Q. And to whom did you make complaint?

A. I think the telegram went to Allan Brown the attorney for—whether it is Reconstruction Finance Corporation or Metals Reserve or what not, it is marked on my telegram.

Mr. Maury: We will find that in the course of the day. I will proceed to another question. We can find that telegram. [70]

Q. Mr. Mouat, did you go to your property or

(Testimony of Malcolm William Mouat.)

to the properties of Lake Placer a week or two ago with two young architects? A. Yes, sir.

Q. What were their names?

A. Harry Loners and Elmer Link.

Q. Was there any stenographer or any writing done?

A. Yes, sir, two stenographers.

Q. Of matters that were observed there?

A. Yes, sir, two stenographers.

Q. And you took them to the property?

A. Yes, sir.

Q. What did you do as to showing them the property that was in the lease and the property that was not in the lease?

A. We went through every house and building.

Q. Every house and building? A. Yes.

Q. Of property that was in the lease?

A. In the town site and the town of Mouat.

Q. Within the town site? A. Yes, sir.

Q. But did you show them a plat with the line of demarcation? A. Yes, sir.

Q. Did these young men, or rather one, observe the [71] conditions in one half of the buildings and the other observe the conditions in the other half of the buildings?

A. Yes, and jointly all together.

Q. And each one was using a stenographer all the way? A. Yes.

Q. In writing down what was found?

A. And as I stated jointly they all went into

(Testimony of Malcolm William Mouat.)

certain buildings so they could consult each other.

Q. Yes. Mr. Mouat, was there a wooden tramway from that property down to the mill?

A. Did you say wooden?

Q. With wooden uprights or what were the uprights? A. Iron uprights, steel.

Mr. Maury: I beg your pardon, the question and answer may be stricken.

Q. Mr. Mouat, how much rent has been paid? How much rent has been paid under the lease?

A. Do you mean royalty?

Q. I mean rent. I mean the \$10,000. a year.

A. Well that would be in the bank record which we have.

Q. But how many years have you received the rent?

A. I would say that first ten thousand in 1941.

Q. And how was the second ten thousand met?

A. Met by some royalty I presume.

Q. It was met was it? [72]

A. Yes, and the third, well, just a minute. That would be two years?

Q. Two years it has been paid? A. Yes.

Q. And that would be for 1942 and 1943?

A. Yes, the last quarter of 1943.

Q. And there was \$1,000 received after that?

A. Yes, just when they gave up the lease to comply with the lease they gave that up.

Q. Is that all?

A. I will not state that but I will state that——

(Testimony of Malcolm William Mouat.)

Q. I mean all that has been paid on the rental?

A. You said all and I want to be correct.

Q. Yes.

A. It was two or three or four hundred dollars, whatever it is, in that it was paid to the bank and that was a part of an overpaid tax from either Nelson's office or Gaethke; Gaethke was manager and Nelson worked under him. I would have to look that point up.

Q. But as far as the rent is concerned there has been two years' rent and \$1,000 paid?

A. Yes.

Q. That is all?

A. Some other royalty you know.

Q. I realize that but the royalties if there was over-payment [73] in one year, it could not go forward to another year, could it?

A. Well that part of the lease is too deep for me to understand.

Q. That is the lease, yes. Mr. Mouat, since March 1st, 1946 have some of these houses been occupied? I mean those on——

A. Lake Placer?

Q. Yes, sir. A. Yes, sir.

Q. Do you know about how many of them?

A. I never counted them.

Q. Are some of the same people—did some of the same people that were occupying them before March 1st continue to occupy them afterwards?

A. Yes, sir.

(Testimony of Malcolm William Mouat.)

Q. Can you name some of them?

A. Well I would say that Art Helseth was one man. The others lots of them know me and I have known some of the young fellows there for years but I do not know their names unless I thought deeply.

Q. And they were occupying them before the notice of termination was received and they continued to occupy them afterwards?

A. Yes, sir. [74]

Q. Are some of them occupying them now?

A. Well one of them was locked the other day but that is just off that line.

Q. How late have people been occupying them?

A. Well there is a great many men up there now tearing down houses and where they are camping or living I did not go around like a policeman to see.

Q. By the way are they transporting houses from that property right now or when you left to come to court?

A. The other day.

Q. From what property are those houses coming down the hill?

Mr. McKevitt: I have an objection, your Honor. It is very important whether they are inside or outside of that line and general talking about the houses does not give a true picture.

The Court: You will have to be certain about it so the record will speak the facts.

Mr. Maury: Yes.

(Testimony of Malcolm William Mouat.)

Q. (By Mr. Maury): Is anything being done about the houses to the left of the line "M" "O" "P" now or recently?

A. The top of the map is always north.

Q. Yes, the top is north.

Mr. McKevitt: As I understand it any testimony [75] with respect to any activities after September 1st, 1946 is subject to my objection?

The Court: Yes.

Q. (By Mr. Maury): What happened right there in the last two or three weeks?

A. North of that line a great many buildings on the——

Q. North of the line?

A. This is north.

Q. We don't want—we are not concerned with those. What is happening to the buildings south of the line there and west of the lines "M" "N" "O" "P"?

A. I do not know that anything is happening there.

Q. They are not so far as you know. Have any of those buildings that are on the ground in the lease been removed?

A. What is that question again?

Q. Are any of those buildings that are on the ground in the lease been removed?

A. When do you mean?

Q. I mean since the 1st of March, 1946, and up to the present day how many of the buildings

(Testimony of Malcolm William Mouat.)

on the land in the lease have been removed?

Mr. McKevitt: Objected to, your Honor. The form of that question is too broad. I would like to have him state the date when they were removed.

Mr. Maury: You know the dates. We have asked for the dates in our complaint, the dates of everything and you haven't answered them.

Mr. McKevitt: It is important as to what you are asking this man to testify to. Is he testifying to one time or another?

The Court: As of what date did he notice the removal of buildings or anything up to what date.

Mr. Maury: We ask of counsel if you have the dates of removal we demand them.

Mr. McKevitt: The buildings were removed after September 1. The ones that were removed from the premises were removed by the War Assets Administration. There were some twenty odd after that date; that is the reason I am making these points.

Mr. Maury: Have you the dates?

Mr. McKevitt: I have got them, yes.

Mr. Lamb: You have a right to secure them in a bill of particulars.

Mr. Maury: We demanded them in the complaint and if they are in court and available, we demand them.

The Court: I am just wondering where we are going to drift to in this connection. If we are going to drift to an accounting which must be had, it would take a very long time. [77]

(Testimony of Malcolm William Mouat.)

Mr. Maury: No, sir, we expect to get our testimony in today.

The Court: Houses, buildings, nuts, and nails, timbers and everything of that sort, have you got an inventory of all that stuff?

Mr. Maury: We have asked them for it. We demanded these back two or three weeks ago.

Mr. McKevitt: Your Honor, we are perfectly willing to concede 22 buildings were removed after September 1, 1946.

Mr. Maury: That is all we wish.

The Court: Do you want to show how many were removed before that?

Q. (By Mr. Maury): Do you know how many were removed before September 1st, 1946? I think there was only one or two.

A. That I would have to look into my diary, but when you filed the *lis pendens* right after that this destruction seemingly stopped right after that date.

Mr. McKevitt: That is not responsive. I move to strike that. Just answer the question.

The Court: He wouldn't know without referring to his diary.

Q. (By Mr. Maury): Mr. Mouat, have you the pass with you that was [78] required of you to get to your own land? A. Yes, sir.

Mr. Maury: Let's see it.

Q. Did anyone demand that pass of you after it was delivered to you? A. Yes, sir.

(Testimony of Malcolm William Mouat.)

Q. Who did?

A. One of the guards at the gate.

Q. About when was it that it was demanded that you deliver it up?

A. Shortly after the date that you were up there that I couldn't get through.

Mr. McKevitt: That doesn't mean anything in the record.

Witness: This is roughly the time of August 28th.

Mr. McKevitt: Roughly August 28th, 1946?

A. (Witness): Well within the course of a few days when we was having all this trouble.

Mr. McKevitt: 1947 or 1946?

A. (Witness): August 28, 1946, is when this thing was to terminate.

Q. (By Mr. Maury): And about how many days after that did they demand this pass of you?

A. Oh, I would say two or three days. I was at Helena [79] at the time my wife took possession.

Q. When she took possession or tried to take possession?

A. We thought we took possession.

Q. About how many days after you, after that August 28th was this pass demanded of you at the gate and that you surrendered it?

A. I would state that that was the following Monday after August 28th, just two or three days, because I come from Helena and had a registered letter, two or three of them from War Assets which

(Testimony of Malcolm William Mouat.)

I have in my file, and then they asked me to turn that pass in and I wouldn't.

Mr. Lamb: Your Honor, I ask then that all of this testimony with reference to this pass be stricken from the record because this witness testified demand was made by War Assets and if such demand was made by the War Assets, the Reconstruction Finance Corporation is the only defendant remaining in this case and is not responsible for its actions.

Mr. Maury: The answer is that the lessee is the one the landlord looks to in law and we are looking to that lessee right now.

The Court: Well that is the same objection made here before. It will be received. The testimony will stand subject to that objection.

Mr. Maury: We offer in evidence the pass that was spoken of. [80]

The Court: All right, mark it.

Mr. McKevitt: The same objection.

The Court: All right.

(Whereupon said Plaintiff's Exhibit No. 3, being an Identification Card Serial No. 450, offered and received in evidence, is a part of this record, and is in words and figures as follows, to-wit:)

(Testimony of Malcolm William Mouat.)

PLAINTIFF'S EXHIBIT No. 3

Columbus, Montana

Identification Card

Ser. No. 450

Name—William Mouat.

Address—Nye, Montana.

(Defense Plant Corporation)

Signature.....

Issued by—Harry C. W. Richter.

Date Issued—Jun. 1944.

Issued Permanently.

(Reverse Side)

Card No.....

Occupation.....

Age..... Weight Height.....

Hair..... Eyes.....

Car No.....

Upon termination of employment this card must be returned to timekeeper. [81]

Q. (By Mr. Maury): Mr. Mouat, what have you to say as to whether the guards have been at the lower gate steadily since March 1st, 1946?

A. There was three shifts there for a while and then it dwindled to two and finally to one.

The Court: Answer the question.

Q. Answer the question. What have you to say whether those guards have been at the gate steadily since March 1st, 1946?

A. Up to the present time?

Q. Yes. A. There's no guards there now.

(Testimony of Malcolm William Mouat.)

The Court: Answer the question.

Mr. Maury: Answer the question, Mr. Mouat.

Q. What have you to say whether those guards have been there steadily since March 1st, 1946?

A. The last month they haven't been there.

The Court: Yes or no.

Q. Were they steadily until about a month ago?

A. I would say yes.

Q. Continuously were they there?

A. Yes.

Q. And was there any man in charge up at the Mouat camp?

A. I think Mr. Hugh Nicely was the man in charge of it. [82]

Q. Is he here in the court room?

A. Yes, that is Hugh.

Mr. Maury: The lease is an exhibit to the complaint; it is admitted to be correct in the answer.

The Court: We will take a recess. (11:20 A.M.)

(The court then recessed until 11:30 A.M., at which time the parties and counsel were present.)

The Court: Proceed.

Mr. Maury: If the court please, we have two young men here, professional men, and one of them wants to get away to Glendive on his business and we would ask leave to put Mr. Link on at this time.

The Court: Very well. No objection.

Mr. McKevitt: No objection.

ELMER LINK

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Shone:

Q. State your name to the court.

A. Elmer Link.

Q. What is your business, Mr. Link? [83]

A. Office Manager, J. G. Link & Co.

Q. And what business is J. G. Link & Co. in?

A. Architectural Engineers.

Q. What college are you a graduate of?

A. University of Oregon, bachelor of science degree.

Q. Masters? A. Bachelor of Science.

Q. Bachelor of science degree? A. Yes.

Q. And did you study architecture in college?

A. Yes.

Q. And in the business that you are now in what do you do, what does it consist of?

A. Preparation of plans and specifications, design of buildings, estimated quantities and estimating costs.

Q. How long have you been in that business? That is, you yourself?

A. Off and on about eighteen years. Ten years I would say probably would be the full time.

Q. And in the last ten years has your business consisted solely of giving estimates of construction and figuring out price of materials and labor and things of that sort?

(Testimony of Elmer Link.)

A. No, it is design and preparation of plans and specifications which always involves estimate of the building to the owner. In other words, we have to give the estimate of [84] cost to the owner on preliminary sketch, preliminary drawing or preliminary study we call it. It is our business to determine for the owner about how much money these buildings are going to cost, frame, reinforced concrete, steel, or whatever it is.

Q. And how about buildings already built do you give estimates to people who want to buy?

A. Occasionally.

Q. How often?

A. We have occasion probably once every four months.

Q. To estimate value of buildings already constructed?

A. Those are larger buildings.

Q. Now have you had occasion to go up to what is known as Mouat town or Mouat camp in the Stillwater country?

A. Yes.

Q. And showing you plaintiff's Exhibit No. 2, which is a map, have you seen that map before?

A. Several times. We spent—about two weeks ago we made a trip up there as preliminary examination. Saturday, November 8th we made a trip specifically to examine all of the buildings on this plot of ground known as the upper Mouat upper Lake camp and we did examine only those buildings according to that plat as we called them for identification purposes.

(Testimony of Elmer Link.)

Q. Now I notice on this plat that the houses you numbered, all the buildings numbered are south of the line which is now marked "M" "N" "O" "P", is that correct? A. That is correct.

Q. You did not mark any of the buildings north of that line "M" "N" or east of the line "N" "O" or north of the line "O" "P"?

A. We examined buildings as we identified it. As I recall building No. 8-E was occupied. Exclusive of that it was just those buildings south of the "M" "N" line there were the buildings that we examined.

Q. Those that are numbered from 1 up to 78?

A. 78, that is right.

Q. And also from 1 up to 20?

A. That is correct.

Q. And including how many barracks?

A. 4 barracks we examined and including the mess hall or boarding house, and the store, and hospital, and then there was a post office there.

Q. Well now in reference to the one you mention No. 8-E that was north of the line "O" "P" and is now excluded? A. Yes, it is excluded.

Q. You did however examine it but it was not within the leased property? A. That is right.

Q. Now do you understand that the property, that the [86] buildings which you marked and have figures on here and the numbers was property within the leased property? A. That is correct.

Q. Or within the lease? A. That is right.

(Testimony of Elmer Link.)

Q. Now who did you go up with?

A. Mr. Loners.

Q. And who is Mr. Loners?

A. Mr. Loners is associated with our firm, J. G. Link & Co.

Q. And he is a licensed architect?

A. Yes, he is a licensed architect.

Q. The two of you went in all of the houses there on what now is known as the leased property?

A. We did not go into all of the houses. We entered all of the houses we could enter, but every house we looked into every house. We couldn't enter all of the houses but some of them we could see that the plumbing fixtures were gone. We did not enumerate anything in our letter of explanation to Mr. Mouat other than what we could actually see.

Q. So you did give him a letter of what fixtures were removed in each of those houses?

A. Yes.

Q. And what damage was done to each of the houses? A. Yes. [87]

Q. And anything mentioned in this letter which I have from you to Mr. Mouat that damage which you have listed here or destruction, you actually saw that? A. That is correct.

Q. If they were destroyed in any other respect than what is stated in your letter, then you did not see it and it is not listed? In other words, I mean there may be some destruction you did not see?

A. That is correct. We did not. When we made

(Testimony of Elmer Link.)

the letter up we made it up with the idea that we were going to be—we did it as conservatively you might say as possible, and there were a good many small items there that we overlooked. But for the purpose of estimating which we possibly, we didn't breakdown every little item. We took only those items which were quite visible or very visible to anybody and we gave that. We included those items but not, well, here and there there was a wall-board gone or cut or broken; we didn't take those small items into consideration.

Q. The houses that you have marked there on the plat, what kind of houses are they?

A. All frame houses. Most of them single family dwelling house, some duplex.

Q. But all frame houses are wooden buildings?

A. Yes.

Q. Everything on the leased property? [88]

Q. What do they set on?

A. Concrete piers.

Q. And are they attached to the concrete piers in any way?

A. The stringers rest on the concrete piers.

Q. And the concrete was imbedded in the ground?

A. That is right. In some cases the piers were upset and the houses missing.

Q. Now you have listed over here the character of buildings that were on the leased property as you found them? A. Correct.

(Testimony of Elmer Link.)

Q. And according to this map there were 22 duplex houses? A. 20 duplex houses.

Q. Those 20 are numbered, are they not, from 1 to 20 on the map?

A. We numbered those for the purpose of identification, yes.

Q. The other numbers here, larger numbers like 296, 295, 294, I will ask you if those were the numbers that were on the houses, a house number?

A. Yes, house number.

Q. But the numbers you put on are figures 1, 2, 3, 4, 5, up to 20? A. Yes.

Q. Denominating there were 20 duplex houses?

A. That is right. [89]

Q. And then there were four barracks and you have over here in red a "B" which stands for barracks? A. That is right.

Q. And there were four barracks within this area? A. That is correct.

Q. And then you have 22 single units removed, and then over here in red you have "C" which denominates those particular units?

A. The "C" unit we were unable to definitely determine due to snow and everything just what size those "C" units were. Now we assumed that there were two different types of single family dwelling houses there, one as I recall 24 by 25 and I think the other 26 or 27 by 28 roughly. Now we assumed that the smaller, the "C" unit was the small single family units.

(Testimony of Elmer Link.)

Q. But those that are marked "C" I notice are the ones that have been removed?

A. They have been removed.

Q. And there are no other buildings marked "C" except those that have been totally removed?

A. Correct, that is right.

Q. And there are 51 single units which you marked here. Now the 51 that you marked "E", they still remain there?

A. That is right.

Q. Now, of course, as you say, the plumbing fixtures and wiring has all been removed out of those? [90]

A. The plumbing fixtures have all been removed, and the wiring fixtures as we have enumerated and the like have been removed. Now there is some of the houses the wiring is removed completely and some of the houses the wiring is intact, but where the outlets occurred they cut the wires so short that they have ruined the whole wiring system and it would be up to—and then some of them the porcelain fixtures were there in part and some of the porcelain fixtures were there entirely. We tried to enumerate those various items there that were missing in the different houses.

Q. In order to expedite this matter for the court, Mr. Link has prepared a letter here and has denominated each house which he examined on the leased premises, stating here what has been removed or what has been destroyed in each house, and giving his estimate of the replacement cost so as to put the

(Testimony of Elmer Link.)

house back in the same condition as it was before destruction, isn't that true?

A. That is correct.

Q. And in your statement that you have prepared you have identified each house and those things which have been destroyed or taken out?

A. Correct.

Q. And then as to all of those items which have been removed from the houses what the cost of repairing what has been destroyed in the house you have estimated it giving a [91] total estimate for each house?

A. A replacement cost to put that building back in shape in its original form.

Q. And that has gone for each house?

A. Yes.

Q. And is the statement which I hand you which is the letter from you to Mr. Mouat, is that a true and correct statement of the replacement cost of all of the items which were removed or destroyed?

A. No.

Q. That you show?

A. No. It is based on current prices. Our figures were very conservative. It is doubtful—approximately 75 to 80%. In other words where we have \$1,000 it would be very doubtful and I would say this that you couldn't get a contractor to go up there for the figures that we have indicated here to replace the damage that has been done to those houses,

(Testimony of Elmer Link.)

and these figures are possibly 75 to 80% of the actual cost that it would take to repair these buildings.

Q. In other words, it is 75 to 80% less?

A. That is right.

Q. Than what a contractor would actually charge or 20 to 25%?

A. Yes. In other words, these figures actually represent 75 to 80% of the value of what it really would actually cost. [92] In other words we wanted to be conservative on these figures and we do know that these figures are minimum figures in so far that it would cost at least the amount that we have indicated here. That is the way we have tried to get this letter up to do it correctly.

Q. And in basing your valuation on replacement cost on each of the items stated in each of the houses you have taken a minimum figure?

A. That is correct, yes.

Q. And something less than what a contractor today would do it for?

A. That is right.

Mr. Shone: Now in order to save time I will offer this in evidence and the court then could check each house as to the replacement cost of putting it back in the same condition it was.

The Court: Have counsel on the other side seen the letter?

Mr. McKevitt: No, your honor.

The Court: Well you better give them an opportunity to look it over during the recess. Have you an objection to it?

(Testimony of Elmer Link.)

Mr. McKevitt: Yes, we will have an objection.

Mr. Lamb: We haven't seen it.

The Court: Let them look at it. [93]

Mr. Shone: I gave them a copy.

The Court: All right.

Mr. Shone: Well there would be no necessity for me to go into each item.

The Court: I think he covered the ground pretty thoroughly.

Q. (By Mr. Shone): Each and every item stated in this letter is correct and was made by you?

A. By myself and Mr. Loners.

Q. Yes, but each item is correct?

A. It is minimum cost.

Q. And is it correct?

A. It is minimum cost of replacement.

Q. And that covers each and every house on the leased premises?

A. It covers each house, each building.

Q. Each building?

A. Each building. There is one item of the mess hall which we did not include and which we could not determine. We have said that I think we estimated there just the wallboard and wainscoting, and a few plumbing fixtures we could not determine which were in a 4 x 5 room, and apparently there were a good many kitchen fixtures that we couldn't determine what size units they were or just what was missing in there. [94]

Q. May I ask you on something besides the cost

(Testimony of Elmer Link.)

of replacing these various houses and the condition in which they were. We will say for salvage if one was to sell each of these buildings to a purchaser who would be willing to pay for the buildings, to pay the owner for the buildings and remove them at the purchaser's own expense from the property, what would you think would be the reasonable purchase price to the owner of those buildings for the salvage?

A. The buildings in their present condition. The plumbing fixtures have all been removed and wiring fixtures, salvage value would not, it would not represent any, it would not represent a very great portion of the actual cost of constructing them up there, probably seven to eight hundred dollars, I would say.

Q. For each building?

A. Yes, in their present condition.

Q. And if the plumbing were in each of the buildings as originally constructed, what would the salvage value of each of the buildings be?

Mr. McKevitt: If the court please, we object to that on the ground the testimony of this witness is that he isn't familiar with the houses in their original condition.

The Court: I don't know whether he is qualified to testify to the value of the plumbing. I think Mr. Maury brought that—What was the value of the plumbing took out if you know? [95]

A. Put it this way, that the ordinary house, five

(Testimony of Elmer Link.)

room house will cost about \$900 to \$1000. on the average for the plumbing fixtures which that house had in it. That would include tub, water closet and lavatory and sink in the kitchen. That could be very difficult to determine unless you actually had a contract bid on it whether that plumbing was in there or out of there. Now if the contractor moved that house he has the opportunity of taking the plumbing out and selling the items piece by piece, or the opposite, leave them in there. Now I would say moving it in bulk I would roughly say it would increase the value of that house by not less than \$300.

Q. The plumbing?

A. Yes, if everything was intact.

Q. That is on salvage?

A. Conservative figures, yes.

Q. And you gave us the value of the houses without plumbing at around \$800.?

A. I would say you could probably get bids on those houses between seven and eight hundred dollars.

Q. Between seven and eight hundred dollars?

A. Yes.

Q. And the plumbing for salvage would be around \$300? A. Yes.

Q. Now the 22 houses that were destroyed, of course, [96] there is nothing but the foundation, concrete foundation left?

A. In most cases. In some cases the piers were missing or upset.

(Testimony of Elmer Link.)

Q. Now the piers you mean the foundation?

A. Yes.

Q. Are broken or upset? A. That is right.

Q. Part of the houses themselves are all gone, the wooden structure and the plumbing?

A. Correct.

Q. All the houses that are there at present, not ones that have been removed, you examined them carefully? A. Yes.

Q. As to what they were made out of?

A. That is right.

Q. And the floors inside, what were they made of?

A. It consists of subfloor and 1 by 4 fir flooring.

Q. Fir? A. Yes.

Q. Then there are wooden floors in each of the houses? A. That is correct.

Q. The structures themselves were made out of wood? A. That is correct.

Q. And what about the roof of each of the buildings? A. Fir roof. [97]

Q. That is wooden roof? A. Yes.

Q. All of the buildings are made of wood, is that true?

A. That is correct. Frame construction as it is generally called.

Mr. Shone: That is all. That is with the exception that after they look at this I would like to ask leave of court to put this in for the assistance of the court in arriving at what the witness has testified to.

(Testimony of Elmer Link.)

The Court: You may begin cross-examination.

Mr. McKevitt: I would like to defer it until we have an opportunity to read this.

Mr. Shone: I probably could call the other witness. It would just take five minutes. Mr. Loners.

Mr. Maury: I think we have shown that.

Mr. Shone: That is all I want him to say, that he was there and assisted.

The Court: He is right here; put him on the stand.

HARRY LONERS

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Shone:

Q. Your name? A. Harry Loners. [98]

Q. You are a graduate of what college?

A. University of Washington.

Q. With what degree?

A. I have a degree in architecture, bachelor of architecture.

Q. For whom do you now work?

A. I am associated with J. G. Link & Co., Architects and Engineers, Billings.

Q. How long have you been working for that company? A. Since 1935.

Q. And in your business what do you do?

A. I perform all the duties of an architect.

(Testimony of Harry Loners.)

Q. And that is making estimates of buildings, the cost? A. That is one of the duties.

Q. In estimating the cost of buildings do you also estimate the cost of plumbing, wiring and things of that sort?

A. It is all considered part of the cost of building and you have to make estimates of that portion of the work as well as all other portions.

Q. And you keep up on the price of plumbing materials, cost price? A. Yes.

Q. And wiring and also lumber? A. Yes.

Q. Wire and steel? [99] A. We have to.

Q. Now did you go up to the Mouat camp with Mr. Link?

A. I was up there with him last Saturday, November 8th.

Q. Did you go on the portion of the property at the upper camp known as Mouat camp shown on Plaintiff's Exhibit 2? A. Yes.

Q. You are familiar with this map?

A. Yes.

Q. And the houses that are on what is known as the leased premises are all numbered?

A. Yes.

Q. And you went in those houses with Mr. Link or some of them?

A. Well as he stated we went into those houses that were open and we looked through the windows of those that were locked.

Q. And you made, you prepared with Mr. Link

(Testimony of Harry Loners.)

a letter to Mr. Mouat of the damage done in each of those houses? A. Yes.

Q. And is that the letter?

A. That is the letter.

Q. You are familiar with the replacement costs mentioned in that letter? A. Yes, sir.

Q. And you have figured them out with Mr. Link? [100] A. Yes, sir.

Q. And that covers the items of damage to each of the houses of the premises and the plumbing missing? A. The houses on those premises.

Q. And also with the plumbing taken out?

A. Yes.

Q. And that is all identified in that letter?

A. Yes.

Q. Is the itemization of what is missing or the repairs that are to be made to each of the buildings correct? A. Yes.

Q. And is the figure for the replacement cost is that correct?

A. Well that is an understatement if anything.

Q. It is an understatement?

A. It is what would be considered very minimum value to make those repairs and replacements as of the present day.

Q. Would the contractor today contract to make those replacements at your figure?

A. I doubt it very much.

Q. But other than that figuring the minimum price the statement is correct? A. Yes.

(Testimony of Harry Loners.)

Mr. Shone: That is all. [101]

The Court: Now after counsel on the other side has had a chance to examine this statement he will probably want to cross-examine these witnesses.

Mr. McKevitt: Yes.

The Court: I understand they will both be here?

Mr. Maury: Mr. Link wants to start for Glen-dive on an engagement about three o'clock.

The Court: Well he can come back at two o'clock. Court will stand in recess until 2:00 o'clock.

(12:00 noon.)

The Court then resumed at 2:00 o'clock P.M. on November 13, 1947, at which time the parties and counsel were present.

The Court: You may proceed.

ELMER LINK

· resumed the stand and testified as follows:

Cross-Examination

By Mr. Lennon:

Q. Mr. Link, you testified——

Mr. Shone: Just a moment. We offer this in evidence.

Mr. Lennon: We have no objection to allowing this to go in evidence to indicate what Mr. Link did testify to. [102]

Mr. Shone: Now let the record show that Plaintiff's Exhibit No. 4 is the letter from J. G. Link

(Testimony of Elmer Link.)

and Co., Architects, to M. W. Mouat, which the witness now on the stand has been testifying about.

The Court: Very well, it may be received for what it purports to be.

(Whereupon, said Plaintiff's Exhibit No. 4, offered and received in evidence, is in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT NO. 4

Offices: 317 Electric Building
Billings, Montana—Tel. 5453

Butte Office
111 North Montana
Tel 23604

Member of:

A.I.A. and M.S.E.

J. G. Link & Co.
Architects—Engineers

Billings, Montana
November 10, 1947

Mr. M. W. Mouat
Nye, Montana
Dear Mr. Mouat:

As per your request on Saturday, November 8th, 1947, we examined the buildings located on the property known as Mouat Lake Camp.

For the purpose of identifying the buildings we used a print from the tracing labeled "Plat of Lake Camp for Fire [103] Department." This print in-

Plaintiff's Exhibit No. 4—(Continued)

cluded a legend which was printed on the plat after it had been developed from the tracings. The legend enumerates types of buildings classified as types A, B, C, D, E, F, G, H, I, J, and L. In order to more particularly identify these buildings, we have numbered all of the structures lying southwest of Mouat Avenue, commencing in the South West corner of this plat with #1 and ending in the N. E. corner of this area with #98.

The buildings lying N. E. of Mouat Avenue have been numbered 1A to 20A for the type A duplex residences and Barracks #1 to 4 inclusive labeled on plat type "B" buildings. The remaining 2 structures in this area are labeled F and L and as they are not similar to other structures we did not number them.

The single family dwelling units labeled 1 E to 12 E inclusive and 13 C to 34 C inclusive, measured 24'-3" x 25'-3" outside dimensions. These units all contained living room, kitchen, two bedrooms, closets and bathroom which did contain a shower stall unit, water closet, medicine cabinet and lavatory. The single family dwelling units labeled 36E to 98E inclusive, measured 26'-11" x 27'-10" outside dimensions. These units contained living room, kitchen, 2 bedrooms, closets and bathroom originally with tubs instead of showers. One of these units had a built [104] in stair to utilize the attic space for sleeping and storage room this building is labeled 36A.

Plaintiff's Exhibit No. 4—(Continued)

The following is a list of the buildings which have either been removed entirely from the site and or which were damaged by the removal of portions of the buildings:

House No. 1E

Missing—Kitchen sink, fittings and pipe.
Lavatory, water closet, shower stall & fittings.

All light fixtures, switches, convenience outlets.

One closet door, frame & trim.

Two sides of baseboards in one bedroom.

One side of baseboard in living room.

Heater.

Outside baseboard all around.

Oil storage tank & piping.

Corner boards.

Estimated replacement cost.....\$1020.00

SCHEDULE OF CHARGES:

For full service including supervision, 7% of cost; For partial services as follows: For preliminary sketches 1%; for drawings and specifications, including sketches and details, 5% of estimated cost. If work is executed on cost plus contracts add 1%.

To: M. W. Mouat

11/10/47

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Plaintiff's Exhibit No. 4—(Continued)
House No. 2E

Missing—

Entire kitchen cabinet, sink, fittings 7 pipe.

Lavatory, water closet, shower stall & fittings.

All electric fixtures, switches and convenience outlets.

All interior doors, frame & trim.

All window casings.

All Baseboards.

Electric wires cut close so as to not be reusable.

Some wallboard knocked off, some damaged.

Outside baseboards & corner boards & oil storage tank.

Heater.

Estimated replacement cost.....\$1000.00

House No. 3

Same as 2E plus the electric feeder panel.

Outside same as 2E,

\$1000.00

No. 4E

Same as 2E plus about 30% of wall board removed from inside walls and partitions.

Outside same as 2E.....\$1050.00

No. 5E

Same as 2E.

All wallboard removed from interior.

Plaintiff's Exhibit No. 4—(Continued)

All electric outlet boxes gone.

All Water pipe removed.

Flue pipe missing.

Outside same as 2E.....\$1150.00

No. 6E

Same as 5E except flue pipe laying on floor.

Outside same as 2E except $\frac{1}{3}$ porch floor
boards removed.....\$1140.00

No. 7E

All plumbing fixtures, fittings and water
pipe removed.

All light fixtures, switches & convenience
outlets removed.

All interior doors, frames & trim except 2
doors complete.

All ceiling board in bath, livingroom & 1
bedroom removed.

All wall board in bath, 1 bedroom & 2
closets removed.

All wallboard in outside walls of living
room, $\frac{1}{2}$ wallboard on inside walls of
living room.

Insulation from one wall of one bedroom.

6 outlet boxes.

All baseboard in bathroom living room & 1
bedroom.

Outside oil storage tank.....\$1450.00

Plaintiff's Exhibit No. 4—(Continued)

No. 8E

Oil storage tank from outside.

Evidently occupied & complete inside. \$20.00

To M. W. Mouat

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House No. 9E

Missing

Plumbing and Kitchen fixtures including
all galvanized pipe, (4" soil pipe is in
place). [107]

Wallboard between Kitchen and bedroom
and kitchen and bathroom is missing.

Partition completely removed between bed-
room and living room.

All Electrical fixtures.

Copings around doors and windows.

Heater and Storage tank.

Estimated replacement cost. \$1350.00

Note: There is at least 2,000 bd. feet of
casings and base board in storage here.

No. 10E

Same as 9E, except all wall board missing.

Insulation batt type damaged.

Fir flooring removed in bedrooms.

\$1400.00

Note: Fir flooring that has been removed
stored here.

Plaintiff's Exhibit No. 4—(Continued)

No. 11E

Same as 10E, except all flooring removed.

All wiring removed.

1 window lite broken.....\$1500.00

No. 12E

Same as 11E, except all insulation removed.

All windows removed and boarded up.....\$1710.00

Nos. 13C-34C

inclusive have been entirely removed from site.

Supporting concrete piers for house 13C-

18C inclusive have been removed or

upset\$79002.00

No. 35D Hospital

Outside dimensions 28'-1" x 31'-10".

All plumbing fixtures removed.

Electrical overhead fixtures missing in all rooms except waiting room.

Wallboard missing or damaged in 30% of wall surfaces.

Doors between various rooms removed.....\$1040.00

No. 48 G (Store Building)

We could not enter this building but the structure seems to be intact except for the overhead electrical fixtures which are missing\$50.00

Plaintiff's Exhibit No. 4—(Continued)

Nos. 46D-47D

Two buildings labeled D on map numbered Nos. 46 and 47 seem to be one unit—this building was probably used as a postoffice. Contains two rooms—1 work room for employees and front room for public entrance—contains 6 windows and front and rear door. Dimensions 22'-5" x 36'-4". Building is intact, no fixtures missing with exception of 1 overhead electrical [109] fixture.

Estimated replacement cost.....\$5.00

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No. 36E

26'-11" x 27'-10". Labeled type E, but larger than group of houses numbered from 9 to 12 inclusive. All plumbing fixtures removed—kitchen cabinet and sink cabinet in place. There is one upstairs bedroom with stairway off rear bedroom. Open storage place upstairs not finished. Roof joists exposed and this over partly floored bathroom. Building in general is intact with above exceptions. Front porch 12 x 7 feet. Heating unit and fuel storage tank missing.\$850.00

Plaintiff's Exhibit No. 4—(Continued)

No. 37E

Same size as No. 36. Substantially same condition as No. 36 including the items mentioned in 36 that were missing. No access to upstairs here. Glass panel removed from front door and boarded up on inside. Corner boards missing.....\$855.00

No. 38E

Items mentioned in No. 36 missing here otherwise in same condition as 36 and 37.....\$850.00

No. 39E

Identical as preceding, with same exceptions as to items missing, no access to upstairs. Corner boards gone.....\$850.00

No. 40E

Same as above, fixtures as mentioned in 36 missing, no upstairs.....\$850.00

No. 41E

Same as No. 39.....\$850.00

No. 42E

Same as No. 39.....\$850.00

No. 43E

Same as No. 42 only glass in front door broken and boarded up.....\$855.00

No. 44E

Same as 42E.....\$850.00

Plaintiff's Exhibit No. 4—(Continued)

No. 45E

Same as 44E.....\$850.00

No. F Mess Hall

Building indicated on map as type F and labeled boardinghouse. Dimensions 37'-10" x 71'-4". This is the north wing, and contains Marlite wainscoting and approximately half of this wainscoting is missing. The wainscoting is 6½ feet high. This wing apparently contained the kitchen fixtures which have all been removed. In the northwest corner there is a small room about 4 x 5 which did contain some plumbing fixtures, probably a toilet and lavatory [111] which

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are missing. There is a basement under the northwest part of this wing, about 20 x 30 feet which seems to be intact. All heating units missing. 121'-9" x 41'-9" Dimensions of the main wing of the above mess hall. 37'-8" x 12'-11" Dimensions of the south wing of the above mess hall.

In general this building seems intact with the exception of the masonite wainscoting in the main portion of the building which has been partially removed.

Plaintiff's Exhibit No. 4—(Continued)

The panel for electricity is gone. Two switch boxes removed in main section.

Estimated replacement cost exclusive of kitchen fixtures & heating units.....\$525.00

No. 1B Barracks No. 1

Dimensions 26'-7" x 74'-2". Contains 10 sleeping rooms, 1 wash room on the first floor and lobby. 11 sleeping rooms, 1 [112] wash room on the second floor. Four lavatories and two water closets removed from each floor. All heating units removed, heating pipes still in place. All else intact with the exception of two overhead fixtures in lobby out...\$2370.00

No. 2B Barracks No. 2

Same size and same condition as above.....\$2370.00

No. 3B Barracks No. 3

Same size and same condition as above.....\$2370.00

No. 4B Barracks No. 4

Same size and same condition as above.....\$2370.00

Fire House

Dimensions 46'-2" x 25'.

Same in good condition.

House No. 49E

26-9/10' x 27-9/10' (House No. 246).

Missing Plumbing fixtures and fittings.

(Locked & unable to get inside.)

Plaintiff's Exhibit No. 4—(Continued)

Kitchen sink, lavatory, water closet, bath
tub & fittings.

Medicine cabinet.

Heater and oil storage tank.

Estimated replacement cost.....\$800.00

No. 50 E (House No. 247)

Same as 49E.....\$800.00

No. 51E (House No. 248)

Same as 49E.....\$800.00

No. 52E (House No. 249)

Same as 49E.....\$800.00

No. 53E (House No. 250)

Same as 49E.....\$800.00

No. 54E (House No. 251)

Same as 49E.....\$800.00

No. 55E (House No. 252)

Same as 49E.....\$800.00

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House No. 56E (House No. 253)

Same as 49E.....\$800.00

No. 57E (House No. 254)

Same as 49E.....\$800.00

No. 58E (House No. 255)

Same as 49E except living room and
kitchen.

Electrical fixtures missing.....\$850.00

Plaintiff's Exhibit No. 4—(Continued)

No. 59E (House No. 265)

Same as 49E except front door lock
missing\$805.00

No. 60E (House No. 264)

Same as 49E.....\$800.00

No. 61E (House No. 263)

Same as 49E.....\$800.00

No. 62E (House No. 262)

Same as 49E.....\$800.00

No. 63E (House No. 261)

Same as 49E (But not locked).....\$800.00

No. 64E (House No. 260)

Same as 49E.....\$800.00

No. 65E (House No. 259)

Same as 49E.....\$800.00

No. 66E (House No. 258)

Same as 49E.....\$800.00

No. 67E (House No. 257)

Same as 49E.....\$800.00

No. 68E (House No. 256)

Same as 49E.....\$800.00

No. 69E (House No. 268)

Same as 49E.....\$800.00

No. 70E (House No. 267)

Same as 49E.....\$800.00

Plaintiff's Exhibit No. 4—(Continued)

No. 71E (House No. 266)

Same as 49E.....\$800.00

No. 72E (House No. 274)

Same as 49E except half of insulation

board on porch ceiling missing.....\$810.00

No. 73E (House No. 274)

Same as 49E except front door lock

missing\$805.00

No. 74E (House No. 273)

Same as 49E.....\$800.00

No. 75E (House No. 272)

Same as 49E.....\$800.00

No. 76E (House No. 271)

Same as 49E.....\$800.00

No. 77E (House No. 270)

Same as 49E.....\$800.00

No. 78E (House No. 269)

Same as 49E.....\$800.00

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No. 11A (House No. 297)

Duplex 30'-6" x 24'-6" deep.

Kitchen sink, water closet, lavatory, medi-

cine cabinet, shower stall, all fittings

& heating missing from each apt.

Oil storage tank missing.....\$1400.00

Plaintiff's Exhibit No. 4—(Continued)

No. 12A (House No. 298)

Same as No. 11A.....\$1400.00

No. 13A (House No. 299)

Same as No. 11A.....\$1400.00

No. 14A (House No. 300)

Same as No. 11A.....\$1400.00

No. 18A (House No. 296)

Same as No. 11A.....\$1400.00

No. 17A (House No. 297)

Same as No. 11A.....\$1400.00

No. 16A (House No. 294)

Same as No. 11A.....\$1400.00

No. 15A (House No. 293)

Same as 11A—

South half of No. 293 was open.....\$1400.00

No. 19A (House No. 276)

Same as No. 11A.....\$1400.00

No. 20A (House No. 277)

Same as No. 11A.....\$1400.00

No. 1A (House No. 317)

Same as No. 11A.....\$1400.00

No. 2A (House No. 318)

Same as No. 11A.....\$1400.00

No. 3A (House No. 319)

Same as No. 11A.....\$1400.00

Plaintiff's Exhibit No. 4—(Continued)

No. 4A (House No. 320)	
Same as No. 11A.....	\$1400.00
No. 5A (House No. 321)	
Same as No. 11A.....	\$1400.00
No. 6A (House No. 312)	
Same as No. 11A.....	\$1400.00
No. 7A (House No. 313)	
Same as No. 11A.....	\$1400.00
No. 8A (House No. 314)	
Same as No. 11A.....	\$1400.00
No. 9A (House No. 315)	
Same as No. 11A.....	\$1400.00
No. 10A (House No. 316)	
Same as No. 11A.....	\$1400.00

Very truly yours,
J. G. LINK & CO.

EFL/bj [116]

ELMER LINK

resumed the stand and testified as follows:

Cross-Examination

By Mr. Lennon:

Q. Mr. Link, the replacement valuations you testified to this morning and as contained in this Plaintiff's Exhibit 4 are based on valuations as of the date that you made the inspection of the prem-

(Testimony of Elmer Link.)

ises, is that correct? A. Yes, that is correct.

Q. I believe you stated that your firm among other things has been engaged in making estimates of buildings already constructed, is that right?

A. That is correct.

Q. What type of estimate making, as to value or replacement?

A. Both types. The times you are called on to go into a building and remodel a building and you are called upon to determine whether it is feasible to remodel that building, and if the cost is too much according to your estimates, the owner does not wish to go ahead with the project. Sometimes we are called upon to figure the cost for resale purposes.

Q. Purpose of arriving at resale price?

A. That is right.

Q. Now I am going to refer to Plaintiff's Exhibit 4 and ask you with reference to buildings No. 1 through 12; there [117] are 11 buildings, correct?

A. That is correct. The 8th is out.

Q. The 8th is out. So with reference to 11 buildings, 1 through 12, you inspected all of those, is that correct?

A. I inspected buildings 9 through 12. Mr. Loners inspected buildings 1 through——

Q. Well you collaborated together?

A. That is right.

Q. So between the two of you you did examine 1 through 12? A. That is correct.

Q. All the plumbing fixtures were removed and

(Testimony of Elmer Link.)

practically all the inside was taken out, partitions and everything else, is that correct?

A. Those buildings were in worse condition, more damage occurred to those buildings than to the remaining.

Q. I am going to refer to building No. 35, that is the first aid building, do you recall that?

A. The hospital; I didn't know it was a first aid building.

Q. So that building No. 35 and the other 11 were about in the same general condition, is that correct?

A. No, that is not correct. The building 35 was quite a bit larger building.

Q. I mean as to what was taken out? [118]

A. The buildings 9 to 12 which I examined myself I would say the character probably a little worse than building 35.

Q. A little worse? A. Yes.

Q. But is a correct statement, is it not? What I am trying to do now is break the whole situation down to three categories for the buildings 1 through 11, and building No. 35 had in addition to all the fixtures removed, had some of the building proper removed, is that correct?

A. That is correct, partitions removed, wallboard removed, some of the floor torn up and insulation.

Q. Now with reference to the 22 buildings, being buildings No. 13, 14, 15, then they jump over to—I beg your pardon. With reference to buildings No. 13, 14, 15 and then jumping over to 19 through to

(Testimony of Elmer Link.)

34, inclusive, those were all removed, correct?

A. Yes, entirely removed from the site.

Q. So we now get to the second classification, 22 buildings removed from the premises?

A. Yes.

Q. Naturally you didn't see those buildings and you don't know what those were like?

A. That is correct.

Q. You don't know what fixtures were in them?

A. No more than assuming. [119]

Q. That is the second classification. Now with reference to all the other dwelling buildings, were they in more or less of the same condition?

A. Generally, yes.

Q. With the exception of a minor item here or there?

A. Some of the wallboard might be in places busted and some of the insulation missing, but as a general category the first group of houses were in very bad state of repairs.

Q. We know the first category they were equipped? A. Yes.

Q. And then the second category the buildings were removed, right? A. That is right.

Q. And then the third category fixtures removed generally speaking? A. Generally speaking.

Q. Except for minor items now we go to the fourth classification, including store, post office, bunk houses, and mess halls, they were stripped of their fixtures, weren't they?

(Testimony of Elmer Link.)

A. The heating units and lavatories.

Q. Just a minute. They were stripped of their fixtures with relation to partitions and what not, is that correct?

A. I will answer it in this way. The fixtures generally were missing, as far as the heating and plumbing fixtures; the partitions and wallboards and floors were generally intact. [120]

Q. All these special buildings I have just mentioned were practically in the same condition as the other family dwellings, right?

A. I wouldn't say that. The character of the dwelling units which we did not take into consideration there was considerable more damage done to the walls on the removal of the plumbing fixtures. I am talking of the third category, the larger single family units, there was more damage done when they removed the fixtures than they did in the larger buildings for some reason. I don't know why that was.

Q. Now I am going to refer you to the second page, you will notice 13 on—I believe it is the third page, item 13C on through 34C. You have that in mind, sir?

A. Yes, sir.

Q. That represents the 22 buildings that have been removed?

A. Correct.

Q. Correct?

A. Yes.

Q. And you state in your letter that they were removed and you put a value on those at \$79,002, is that right?

A. That is right.

(Testimony of Elmer Link.)

Q. Was that based upon what you saw in other buildings or not?

A. We assumed that those buildings for the purposes of [121] our estimate they were the same size as the smaller unit, the 24 by 25 unit, or 24'-3" by 25'-3" I believe that unit was.

Q. Now will you turn to page 5 and I direct your attention to house No. 49 E. Do you have that?

A. Yes.

Q. With relation to that particular house in your statement here you took that as the basis for figuring, as a means of convenience to figuring the value of 50E through 78E, that is correct, isn't it?

A. Generally, yes.

Q. They were all in the same condition?

A. They were all in the same condition.

Q. So you used the same item of damage?

A. That is right.

Q. So that when we speak of 49E here we are talking about not only 49E but 50E through 78E, correct?

A. 78E, yes, generally speaking, except for the items we specifically mention that we could see.

Q. Now 49E then you have put a replacement value on it of \$800.?

A. Which is an understatement.

Mr. Lennon: Well I didn't ask you that. I move to strike that out. [122]

Q. You put down there \$800?

A. That is correct.

(Testimony of Elmer Link.)

Q. Now that represents the replacement value of these items, kitchen sink, lavatory, water closet, bath tub, medicine cabinet, heater and oil storage tank and fittings, correct? A. Yes.

Q. That those items just mentioned it would cost \$800 to replace them in these dwellings, correct?

A. Correct.

Q. Did you see the heater and oil storage tank that was in those houses?

A. About three years ago.

Q. Oh, you visited these premises once before?

A. Yes, I was over there about three years ago. May I add something further that as far as the unit, I visited the unit immediately after it was constructed and I don't exactly recall the heating unit but I do recall the oil storage tank.

Q. On the basis of what you recall three years ago you have included in here heater and oil storage tank in the figure of \$800, right?

A. That is correct, yes.

Q. Will you describe that heater and oil storage tank, please?

A. No, I can't describe the heater. As I recall it though it was an upright heater and the oil storage tank I [123] believe was a 300 gallon tank.

Q. Outside the building?

A. Yes, outside the building.

Q. They were in every one of the dwelling buildings?

A. The rack for the heater when we made our

(Testimony of Elmer Link.)

last visit to the site, or for the oil storage tank was still in place.

Q. For the tank? A. For the tank.

Q. Was there any evidence inside the building what type heater was in there?

A. Well, it was an oil burning heater we assume.

Q. What room was it located in?

A. It was in the living room.

Q. What?

A. Off the kitchen in the living room just adjacent to the kitchen.

Q. Do you recall what the cooking facilities were in these dwelling houses? A. No, I don't.

Q. Would it make any difference in your estimate if the oil unit in there for which the tank was placed outside the building was not a heater but a cooking stove; would that change your figure here?

A. Not necessarily. You will find that with a heater for that type to produce that much heat to heat the whole [124] house they only used a single heater would run about the same amount of money. That is for the purpose of our estimate.

Q. How much?

A. An oil heater of that type now retail price would probably run about \$75.

Q. \$75? A. Yes.

Q. And there is an installation charge, I suppose? A. Oh, yes.

Q. What would that run about not counting

(Testimony of Elmer Link.)

shipping; if it was right up there, what would that cost?

A. You are asking a very rough question, depending upon——

Q. I can see it is rough if you don't know what it is.

A. But I would say it would probably run you \$25 to install that by the time you run that pipe under and make fittings and connections. You would have \$150 in the whole unit we figured.

Q. What kind of heating unit was there intalled in the mess hall? I believe that is on page 5.

A. As far as the heating units I saw no evidence of heating units. That is one thing was not in there, the heating units; it was steam heated.

Q. You have a statement here "All heating units missing?"

A. That is it.

Q. I presume that was included in the figure \$525? [125]

A. No.

Q. What does that item include?

A. That was just damage to wallboard, and I do know there was some plumbing fixtures missing in the northwest corner of the building. As far as heating units and kitchen equipment that was not, it was not taken into consideration at all for the purposes of this estimate.

Q. I would like to go back to page 5 again on that house 49E, which we use as a sample here. Can you break that figure down of \$800 for any building?

(Testimony of Elmer Link.)

A. Well, I can try. My figures as anyone will tell you——

Q. Just break it down.

A. The missing plumbing fixtures and fittings. Now then for the actual price on the plumbing fixtures——

Q. That is what I want.

A. Would probably run you in the neighborhood of \$300.

Q. That is what you would have to pay for them down here in Billings?

A. That is just outright buying, purchasing. And then you would have to connect those fixtures up. You would have to lead the fittings, and whatever type fittings you use you have got the trim and your labor would probably run another \$450 and by the time you figured your contractor's profit in there which varies from 10 to 50%——

Q. 10 to what? [126]

A. It varies from 10 to 50%, depends on who you get to do the work. Those bathrooms would run you from \$750 to as high as \$1100 with the kitchen fixtures.

Q. Well you got them in here for \$800?

A. That is right.

Q. You don't want to change that, do you?

A. No, this in a conservative figure. We know this could not be replaced.

Q. So we will not have any misunderstanding this is the figure you are submitting to the court for

(Testimony of Elmer Link.)

the allèged injury for removal of these fixtures from the building, and I presume this \$800 figure is what you are telling the court is the replacement value of these fixtures, right?

A. It is a mis-interpretation. These figures are actually a conservative figure. It is what we know to be safe to say that with these figures or it would be very unlikely you would get anyone to replace these items for that amount of money. There is the possibility that you might.

Q. What you are saying on this particular building, which applies to any of the others, that you could go and buy the fixtures to replace the ones taken out for approximately \$300?

A. That is right.

Q. And that it is going to cost \$450 to put the kitchen sink, lavatory, water closet and bath tub and medicine cabinet [127] in plus the heating unit?

A. I am quoting the going rate and that is all I can quote.

Q. What I am interested in, Mr. Link, is what you as an expert—what is the value of installing these \$300 worth of fixtures?

A. What I said is \$450. I don't believe you can do it for less than that. The going rate on installations of a similar five-room houses is \$900. Of course, that includes soil pipe. Soil pipe comes to \$1.50 a foot.

Q. I haven't seen it and you have. Let's take

(Testimony of Elmer Link.)

the bath tub. We pay for it out of the \$300. And here it is up outside of the building and it is ready to be put in 49E building. And when I say the cost of installation is bringing it in, putting it in position, and taking pipes already there and connecting it right on to the tub. Now that is what I am asking you to tell this court here, what is the cost to install these bath fixtures mentioned in that letter in building 49E after they are paid for? Mind you you have already said you assume the pipes are running up through the floor there?

A. It depends on the character of the work. It appears to us some of that was just pulled out. Now you have a certain amount of wallboard and lumber removed.

Q. Mr. Link, I am just going on what you said here on 49E. You described this to the court as to condition of the [128] condition of the plumbing fixtures and fittings, kitchen sink, lavatory, water closet, and bath tub. Now there is what's missing. Assume that to be the fact that this is what is missing, just those items you have placed there. Now what I want to know, they are right outside the building, to go in and tie them in, how much would it cost? Is that what you mean when you say \$350?

A. That is an old building. I will refer to it again. It depends on the condition of this pipe you are going to hook on to. Now in this particular case and a building being constructed and roughing in the pipe would be much higher to do than a new

(Testimony of Elmer Link.)

building to go and tear out the partition work and wood and lumber and then come back in and put the new pipes in and which would have to be done. So I say this on that premises I say that \$450 for the entire bathroom would probably cover.

Q. You mean for the entire building?

A. Bathroom and kitchen because they are back to back.

Q. And when you take a kitchen sink out you uncouple it from the pipes and move it out?

A. That is right.

Q. And you do the same thing in reverse when you put in in? A. That is right.

Q. I notice that on page 3 on the post office you have [129] just a small item of \$5.00 for an electrical fixture? A. That is correct.

Q. What type of electrical fixture?

A. That was a porcelain lamp holder.

Q. Did you ever see it in there?

A. I assumed it to be the same type fixture as the rest in the rest of the building.

Q. I thought there weren't any fixtures in any of the buildings?

A. Let's see, that \$5.00, that was on page 3. That is 46D—47D which is building, post office building. That is really one building and apparently as I saw it to be or was used as a post office.

Q. Would your estimate of that be different if all there was was an electric light bulb?

A. Yes.

(Testimony of Elmer Link.)

Q. As a matter of fact on all electrical fixtures it depends on the type electrical fixtures?

A. Most of the fixtures were porcelain lamp holders but what they had done on this particular fixture they cut the wires so I didn't—

Q. How do you know most of the fixtures were porcelain lamps?

A. The fixtures I saw were porcelain lamps.

Q. Where did you see them? [130]

A. We saw them in the hospital and I think there were some in the mess hall yet and there were a few in some of the houses.

Q. Are you able to state, Mr. Link, the sales value of these houses that you have inspected up there in place where they are located up at the Mouat mine?

A. Would I be in position to?

Q. Can you?

A. In other words, if those houses were sold to be moved out of there, is that the question?

Q. No, I am not asking you that. I am asking you can you state the market value of those houses in place at the Mouat mine? Can you do that? I am not asking you how to do it but whether you can or not answer it yes or no with reasonable qualification.

A. Yes and no. If they were here I could answer it here but I can't answer it up there. I know values here and in cities.

Q. But you don't know the value up there?

A. I know cost to reconstruct.

(Testimony of Elmer Link.)

Q. No, I am not asking the cost. I say market value. A. No.

Q. Is it because you have never had occasion to go into the value of a house 90 miles up in the mountain on a mine site? That is one of the reasons, isn't it? [131] A. No.

Q. I believe you stated on direct examination that you gave an off site value for these buildings, didn't you? A. That is correct.

Q. And also the figure — correct me — between \$800 and \$1,000? Am I correct in that?

A. Between seven and eight hundred.

Q. Between seven and eight hundred off site value without the—as you saw them up there generally speaking?

A. That would be my offhand estimate.

Q. And I am not referring to this first section of houses but the ones to the northwest which had just fixtures removed; you say they have between seven and eight hundred dollars off site value?

A. I would say that, yes.

Q. And you say the fixtures in there have off site value of approximately \$300?

A. Probably, yes.

Q. And I believe you said that that would be the high bid that you would get for this type of house?

A. If a contractor was going up there and bid that and move them off there, yes.

Q. In other words, a bid is a pretty good indica-

(Testimony of Elmer Link.)

tion of what their off site value it, isn't that correct, sir?

A. Depends upon the purposes for which you wanted to [132] use the buildings for. The value is established by the person who desires the building.

Q. By that I mean you own the buildings and you want to sell them and everybody comes in and bid and I bid \$800 you would sell them to me, and that don't you think that would be a fair value established for off site irrespective of what I was going to do with them? You sold them. You were the owner.

A. In the present condition, yes.

Q. Mr. Link, can you state whether or not the houses as you found them at the Mouat mine as you inspected them, can you state whether or not they have a market value where they are right now as they are now located?

A. Yes, they do have.

Q. I don't mean for off site value. I mean for use in place. They have a market value up there at the Mouat mine today in the place as they are?

A. Do I have to answer that in one word or two words?

Q. Either you can state it or you can't.

A. Definitely I myself feel they do have better market value up there than they do here.

Q. They have a market value in place up there?

A. Sure they have.

(Testimony of Elmer Link.)

Q. On what do you base that?

A. You want my own opinion. If the buildings were to [133] be sold and that I could use them myself?

Q. Up there? A. Yes, definitely.

Q. What could you use them for?

A. You could use them for a Dude ranch or health center.

Q. Let's assume you wouldn't be allowed to put a Dude ranch there because the land was only unpatented land and could be used for mining purposes only?

A. Then you would have to look in to see if you could get a patent.

Q. Assuming you couldn't get a patent?

Mr. Maury: We object. He is propounding the question which is a most serious one. In this case the landlord is presumed to have the title and the tenant can not in any way impeach him.

The Court: Well, that is a general proposition of law.

Mr. Lennon: I concede. I am not asking it for that purpose, your Honor. The fact has come out by Mr. Mouat's testimony he has an unpatented mining claim here. Now that is the fact as it stands up until now and I am asking the witness whether or not that has a market value in place under the present conditions.

The Court: Well he thinks it has and has given

(Testimony of Elmer Link.)

you the reasons for it. I will sustain the objection if that [134] is what you are waiting for.

Q. (By Mr. Lennon:) Are there any industries—what is the nearest industry to the Mouat townsite?

A. Well, the nearest industry to the Mouat townsite I would say mining or I would say Dude ranching. Dude ranching is nearest as to the actual——

Q. Where is that located?

A. That is located four miles above Mr. Mouat's ranch.

Q. What other use could you put these buildings to in place there?

A. Depending upon the mining which I am not—which I don't pretend to know anything about.

Q. Other than mining?

A. Well, just offhand those two. Those are two items that I would myself would like to have those buildings for.

Q. But you wouldn't want them for any other purpose, would you, in place?

A. I wouldn't know but probably——

Mr. Lennon: That is all. [135]

Redirect Examination

By Mr. Shone:

Q. Mr. Link, the heater and oil storage tank you spoke of, how were they connected?

A. Well, they were on a piping system. They

(Testimony of Elmer Link.)

weren't connected when we were up there.

Q. No, but you were up there about three years ago and you saw them at that time?

A. Yes, I saw the unit as it was constructed, although it was three years.

Q. Yes, but how were they connected up, the storage tank outside with the heater inside?

A. It was directly connected to the house on a piping system.

Q. And both were connected together so the oil from the original tank would flow to the heater inside the house?

A. Yes, gravity system.

Q. And what did the storage tank rest upon?

A. Those were 4 by 8's. I believe they were.

Q. On the outside of the house?

A. 4 by 8's or 4 by 6's. I didn't particularly notice but I believe they were 4 by 6's.

Q. When you were up there three years ago at that time were these houses built at that time, all of them? [136]

A. Mr. Mouat took me to one or two of them. I think we went into the duplex. We went into the duplex and we went into one of the single family dwelling units.

Q. In reference to those marked "C" that are now destroyed, were they up there when you were up there, do you remember?

A. It seems to me they started that construction from this lower corner. As to whether or not the row there were up and some of those buildings, the

(Testimony of Elmer Link.)

buildings in the rear I think that No. 9 and 12 buildings were there and I believe the rest of them were under construction.

Q. You mean the first buildings constructed here starting with 1? A. No, this third row.

Q. Oh, the third row.

A. Yes, as I recall it now. And then the duplex. There was a duplex constructed because I went into the duplex.

Mr. Shone: That is all.

Redirect Examination

By Mr. Lennon:

Q. So you are making this, giving this figure here to include oil heaters or what you saw up there three years ago, is that correct? [137]

A. No, I am not. I am making—we made our estimate knowing that there was an oil storage heater in there and the heater had to be large enough to take care of that, and the cheapest heater you can get there would cost you \$50. The very cheapest to give any heat at all. And we know that the storage tank from other witnesses I have talked to, or other people I have talked to was a 300 gallon tank. Now the rack that is there is for a 300 gallon tank, and all we can do is assume when a thing is missing.

Q. What is the cheapest oil cooking range?

A. I am not familiar with that.

Q. You wouldn't be able to give any value on

(Testimony of Elmer Link.)

that? I am talking about an oil cooking range which has a pipe running outside to a tank; you are not familiar with that?

A. We have never installed one.

Q. How long have you known Mr. Mouat?

A. Oh, about 27, 28 years, I guess.

Q. And when you went up there last week was there any chain across the road stopping you?

A. No. You mean chain? You mean stop sign? Or the word "stop" on anything?

A. No, any part of the road where you found a chain stretched across it and locked so you couldn't proceed?

A. No, sir.

Q. None when you went up there that day? [138]

A. There was a chain across that road but it wasn't for that purpose. It was to hold a truck on the road. There was a chain just across the road as you described it.

Q. Was there any chain stretched across the road for impeding your progress up the hill to the townsite?

A. No chain put there specifically for that purpose.

Q. Then there was no chain to impede your progress going up that hill, right?

A. No, that isn't right because there was a chain and that might impede your progress.

Q. In what way?

A. The chain was hooked on a tree and this trailer had gone over the bank.

Q. For the purpose of pulling this truck up?

(Testimony of Elmer Link.)

A. Yes. There was snow on the ground and it could impede and it could impede, an ordinary person going up there wouldn't have gone across that.

Q. And was that a permanent installation?

A. No, just a temporary thing.

Q. But other than that there was no chain stretched across the road to stop you from going up?

A. No.

Q. With a lock on it?

A. None, no.

Q. In other words, this chain you are talking about could [139] happen out on the highway, it was a temporary proposition?

A. Yes.

Mr. Lennon: That is all.

Mr. Shone: Are you contending Mr. Mouat had the right of way?

Mr. Lennon: No.

Mr. Shone: I thought that you were contending you had given Mr. Mouat possession.

Mr. Shone: May Mr. Link be excused.

Mr. Lennon: Yes.

The Court: If you gentlemen are through with him.

HARRY LONERS

resumed the stand and testified as follows:

Cross-Examination

By Mr. Lennon:

Q. Mr. Loners, you were in the court room and heard the last witness on cross-examination?

A. Yes, I did.

(Testimony of Harry Loners.)

Q. And to save time here your answers are about the same as Mr. Link's? A. Yes, sir.

Q. Do you want to vary it in any respect?

A. There were one or two times when you mentioned all the houses where I would have, I wouldn't have agreed to all [140] the houses, all the dwelling units. There were dwelling units for single families and dwelling units that housed more than one family; there would be a distinction there in those instances.

Q. But other than that why you have nothing to change, to add to change the testimony as given by the last witness? A. Nothing.

Mr. Lennon: That is all.

Redirect Examination

By Mr. Shone:

Q. In the duplexes there were two separate sets of plumbing? A. That is true.

Q. Where in the single there would be one set of plumbing?

A. One set of plumbing in the single and one set of kitchen equipment and heating equipment and cooking equipment.

Q. But the duplex is used for two families?

A. That is right.

Q. And each would have separate cooking?

A. They are complete units in themselves with the one wall.

Q. One building with a set of walls between to separate the two families? [141]

(Testimony of Harry Loners.)

A. That is right.

Mr. Shone: That is all.

Recross-Examination

By Mr. Lennon:

Q. You know Mr. Link's father?

A. Yes, I do.

Q. He is one of the parties in this trust agreement of Mrs. Mouat's, isn't that correct?

A. I don't know.

Mr. Lennon: That is all.

Mr. Lennon: If the court please, I would like to ask Mr. Link that question if I may, please. That last question.

The Court: All right, inquire.

ELMER LINK

resumed the stand and testified as follows:

Recross-Examination

(Continued)

By Mr. Lennon:

Q. Mr. Link, is your father one of the parties to the trust agreement in which Mrs. Mouat is trustee in this law suit? [142]

A. My father is interested in a good many—

Q. Pardon.

A. My father is interested in a good many mining propositions and oil and I am under oath here and I couldn't say.

(Testimony of Elmer Link.)

Q. You wouldn't say he isn't?

A. There is a lot of his business I don't know anything about.

Q. You wouldn't say he is not interested in this mine?

A. I can say this honestly I don't know his affiliations as far as a lot of his oil holdings and mining.

Q. I mean as far as Mouat?

A. No, I say I can't say that because I honestly don't know.

Mr. Maury: For your satisfaction it is admitted he is or was one of the cestui que trust.

Mr. Lennon: That is all.

MALCOLM WILLIAM MOUAT

resumed the stand and testified as follows:

Cross-Examination

By Mr. Lamb:

Q. Mr. Mouat, in December, 1941, when this lease was executed you lived on the place marked "Residence" on Plaintiff's Exhibit 1, did you not?

A. Yes, sir.

Q. Did you live there at all times during the operation of the mine? I mean after the Metals Reserve took it over?

A. Yes, that is my home.

Q. And during the time that they first started

(Testimony of Malcolm William Mouat.)

the construction up here at the townsite did you go up there occasionally to look and see how they were coming along? A. Many times.

Q. Then after they finished this new road around over to tunnel 5 and tunnel No. 2, I believe isn't it; did you go up to what property is known as the mine site and those tunnels?

A. The first road did not go that far.

Q. I know the first road didn't, but when they finished that road did you go up to tunnel 5 and tunnel 2 quite a number of times?

A. Yes, I did but then some of that road, the end of that road from the Lake there was not finished, went on different roads. There was a couple roads there right up that same hill side.

Q. As a matter of fact the old road went up to a nickel mine, did it not, somewhere over on the east side of the colored portion of Plaintiff's Exhibit 1?

A. Do you want to know where that road went?

Q. Yes, if you will, please.

A. Our home is down in here. [144]

Q. You are now pointing at a place marked "Residence" on Plaintiff's Exhibit 1?

A. And the first road come along up in here.

Q. The witness indicated a straight line between the point marked "Residence" just to the south of the point marked "Mill" and to the general direction of the place marked "Dump site." All right, from the dump site where did it go?

(Testimony of Malcolm William Mouat.)

A. Down here to the old smelter, up this way and up in here. That was the first road that we had in the early days thirty years ago.

Q. The witness has pointed generally to the horse shoe curve appearing on the new road just east of, just south of the dump site, then westerly on a line called, or marked on the map as Jame Roadside, and then generally south westerly to a point approximately south of a line marked 45,000, a point near the south west corner of section 21, township 5 south, range 15 east, which is indicated on the map with a cross, and the nickel, the site of the nickel mine was just generally in that area, was it not?

A. Up in there.

Mr. Lamb: That is all; take your chair.

Q. Then until the Government or the Metals Reserve took this lease there was no road from a point just west of the dump site up to what is known as the Mouat town site or to the tunnel 5 and tunnel 2 or Lake Placer claim? [145]

A. Yes, there was a road.

Q. There was? A. Yes.

Q. Where did that road come from?

A. May I show you on the map?

Q. Yes.

A. This whatever you call this point right here, well Smelter site right in here was Anaconda warehouse. From there we turn that way roughly two city blocks and then we ramble on up a steep grade here until we got to a point on Mountain View,

(Testimony of Malcolm William Mouat.)

which is this claim here, and then come around here to tunnel No. 2. That was that road. Now part of that road took a six wheel drive automobile to get up there.

Q. Then at a point adjacent to the point marked on Plaintiff's Exhibit 1 called "Dump site" there is no place on the balance of the new highway that the Metals Reserve put in that crosses or is adjacent to the old road that you had previously constructed upon those premises?

A. They used a part of that road to get up to that point above the dump site.

Q. Up to the dump site but above that and beyond that there is no point where the new road and the old road are even close together?

A. Oh, just 100 or 200 feet there from right here, right in there just above this. [146]

Q. And that old road is that open?

A. Well it is still open but rains and many things have washed down there to dilapidate it.

Q. You didn't maintain it, keep it up?

A. No, I had no caterpillar.

Q. Well then as I understand it, Mr. Mouat, from the time that the Metals Reserve took over this particular lease, executed the lease with you and started operations, that you many times went up to the Mouat town site and also over around tunnels 2 and 5 during the time there were actual mining operations going on and construction work?

A. Yes.

(Testimony of Malcolm William Mouat.)

Q. You were kind of checking on them to see what they were doing, weren't you?

A. Not necessarily. I have my own business on other property there but I watched them the best I could.

Q. Well you were interested in it and wanted to know what was going on?

A. Absolutely.

Q. Then during all of the time up to the present time you have been up there a great number of times since that lease was signed?

A. Yes.

Mr. Lamb: That is all. [147]

Redirect Examination

By Mr. Maury:

Q. Mr. Mouat, you spoke of a Mr. Nicely being in charge of the upper camp since March 1st; he was not a servant of yours, was he?

A. No, sir.

Q. He was representing someone else?

A. I presume the Government or Anaconda.

Q. But he was no servant of yours?

A. No.

Q. Mr. Mouat, you were asked if you had a telegram this morning that you sent to Mr. Brown on March 11th, 1946, is that a carbon copy of it?

A. What do you wish to know.

Q. Is that a carbon copy of the telegram?

A. That is a carbon copy of the telegram I sent him, but may I add?

(Testimony of Malcolm William Mouat.)

Q. Yes, you may add while they are looking at it.

A. Is that a plainer copy?

Q. No, that is another thing.

A. That telegram went out because the Army were tearing down houses below the fence that was used by Cahill-Mooney and others on the building around the mill country.

Q. I see, that didn't relate to this at all? [148]

A. That did not relate to this.

Mr. Maury: Then I withdraw the offer.

Mr. Maury: We offer in evidence a notice of action filed in the county where the property is, certified copy. *Lis pendens*.

Mr. Lamb: We have no objection.

The Court: You offer it in evidence?

Mr. Maury: Yes.

The Court: It may be received in evidence.

(Whereupon said Plaintiff's Exhibit No. 5, notice of action, offered and received in evidence, is a part of this record and is in words and figures as follows, to wit:) [149]

PLAINTIFF'S EXHIBIT No. 5

Office of County Clerk and Recorder, Stillwater
County, Montana

State of Montana,

County of Stillwater—ss.

I, Elsie E. Swan, County Clerk and Ex-Officio Recorder, in and for said County of Stillwater, in the State of Montana, do hereby certify that the

Plaintiff's Exhibit No. 5—(Continued)

attached instrument is a full, true and complete transcript of the Notice of Action Pending. May Paula Mouat, et al., vs. Reconstruction Finance Corp., which was filed in this office on the 28th day of September, A.D. 1946, at 9:00 o'clock a.m. and admitted to record in Book 27 of Misc. Page 239, Records of Stillwater County, Montana.

In Testimony Whereof, I have hereunto set my hand and affixed my seal of the office the 3rd day of November, A.D. 1947.

[Seal] /s/ ELSIE E. SWAN,
Clerk and Recorder.

By.....

In the District Court of the United States in and
for the District of Montana, Billings Division

No. 137321

MAY PAULA MOUAT and M. W. MOUAT, Wife
and Husband, and MAY PAULA MOUAT, as
Trustee of an Express Trust,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORATION and WAR ASSETS ADMINISTRATION, an Agency of the United States of
America,

Defendants.

All Persons Take Notice:

The above-named plaintiffs in the above-named
Court, on Tuesday, the 17th day of September, 1946,

NOTICE OF ACTION PENDING

filed an action which is still pending against the
above-named defendants for the recovery of the
title and possession of all of the land herein described,
together with all of the improvements thereon, and all of the tenements, hereditaments
and appurtenances thereunto belonging.

The description of the said land is as follows:

Those certain patented quartz lode mining claims
situated in Township Five (5) South, Range Fifteen (15) East, M.P.M., in Stillwater County, Montana, known and described as:

Plaintiff's Exhibit No. 5—(Continued)

Bald Eagle—U. S. Lot No. 69-D

Mountain View—U. S. Lot No. 63-A

Rough Rock—U. S. Lot No. 63-B

Also, all those certain unpatented quartz lode mining claims situated in Township Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said county on the dates and in the respective books and on the respective pages, as follows:

Name. Date Cert. Recorded.

Adam—July 19, 1941, Book 24 Misc., Page 207.

Princtons—May 8, 1941, Book 24 Misc., Page 122.

Skunk—May 8, 1941, Book 24 Misc., Page 128.

Sampson—May 8, 1941, Book 24 Misc., Page 126.

Oldco—May 8, 1941, Book 24 Misc., Page 124.

Link—July 19, 1941, Book 24 Misc., Page 209.

Pete—July 11, 1918, Book 7 Misc., Page 122.

(Amended Cert.)—October 17, 1941, Book 24 Misc., Page 288.

Scully—July 11, 1918, Book 7 Misc., Page 122.

(Amended Cert.)—October 17, 1941, Book 24 Misc., Page 286. [152]

Denver—October 7, 1918, Book 7 Misc., Page 233.

(Amended Cert.)—October 17, 1941, Book 24 Misc., Page 291.

Old Lady—July 11, 1918, Book 7 Misc., Page 114.

Westlake—July 11, 1918, Book 7 Misc., Page 116.

Billie—October 17, 1918, Book 7 Misc., Page 242.

Plaintiff's Exhibit No. 5—(Continued)

Chas. F.—July 11, 1918, Book 7 Misc., Page 118.
(Amended Cert.)

Old Lady—October 17, 1941, Book 24 Misc., Page 289.

Chas. F.—Continued:

(Amended Cert.)—October 17, 1941, Book 24 Misc., Page 287.

Gap—July 31, 1941, Book 24 Misc., Page 219.

(Amended Cert.)—October 17, 1941, Book 24 Misc., Page 290.

Jame—October 3, 1941, Book 24 Misc., Page 271.

Soup—October 3, 1941, Book 24 Misc., Page 273.

Pine—October 2, 1919, Book 8 Misc., Page 167.

Also, all those certain unpatented quartz lode mining claims situated in Township Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Park County, Montana, in the records of the said county on the dates and in the respective books and on the respective pages, as follows:

Name.	Date	Cert.	Recorded.
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Smelter	September 23, 1887,	Book Vol. 1, Quartz Locations,	Page 25. [153]
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Smelter	June 8, 1889,	Book Vol. 1, Quartz Locations,	Page 420.
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Also, that certain unpatented placer mining claim, and that certain unpatented tunnel site situated in Township Five (5) South, Range Fif-

Plaintiff's Exhibit No. 5—(Continued)

teen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said county on the dates and in the respective books and on the respective pages as follows:

Name. Date Cert. Recorded.

Lake Placer—July 16, 1940, Book 23 Misc., Page 400.

(Amended Cert.)—June 16, 1941, Book 24 Misc., Page 155.

Monte Alto Tunnel and Tunnel Site—August 13, 1918, Book 7 Misc., Page 159.

Also, all of the right, title and interest of said Lessors now owned, or which may be hereafter acquired, in and to those certain unpatented quartz lode mining claims situated in Township Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which were recorded in the office of the County Clerk and Recorder of said Stillwater County, Montana, in the records of said county on the respective dates, and in the books and on the respective pages as follows: [154]

Name. Date Cert. Recorded.

Mountain View Chrome Co. #1—September 22, 1939, Book 23 Misc., Page 43.

Plaintiff's Exhibit No. 5—(Continued)

Mountain View Chrome Co. #2—August 31, 1940,
Book 23 Misc., Page 434.

Also, all water and water rights, ditch and ditch rights, flumes, easements, rights-of-way, permits from United States Forest Service, buildings and improvements upon, or used, or for use, in connection with the above-described premises.

Dated this 27th day of September, 1946.

THOMAS C. COLTON,

Stapleton Building,

Billings, Montana.

H. L. MAURY,

A. G. SHONE,

Attorneys for Plaintiff,

33 Hirbour Building,

Butte, Montana. [155]

Mr. Maury: Before we rest we ask leave to amend in paragraph 13 of the complaint line 1 instead of 1 building insert 22 of the residence buildings on the said land described, and in line 12 of that page that each of the said buildings already demolished by the defendants was even after the plumbing was removed of the value of \$600. And we ask leave to amend the prayer, the prayer from one building of \$600 by inserting each and 22 residence buildings. I state that that is a different condition of the evidence than it was at the time the suit was started.

(Testimony of Malcolm William Mouat.)

Mr. McKevitt: Your Honor, we have no objection to that. We will simply enter denial of it as our answer.

The Court: Very well, the amendment may be allowed. You want to amend the answer also; you deny it?

Mr. Lamb: Yes, your Honor. Your Honor, in our denial we deny all of that paragraph 13 in our answer, so I assume our answer would apply to this particular amendment.

Mr. Maury: There is another formal amendment. We stated all of the jurisdictional facts in the complaint but the rules prescribe that they shall be put in the first paragraph of the complaint and that is a very wise rule but we didn't obey it. I should have obeyed it. I offer this amendment to show jurisdiction and that it be called paragraph 1-A.

Mr. McKevitt: We noticed that at the time it was [156] filed and didn't make any objection. You should put your jurisdiction in the complaint.

Mr. Maury: I went to college to study a special course and then Congress took all my knowledge away but I did put in the facts; I knew enough substantive law to put the facts in.

Mr. McKevitt: I have no objection. I can't quite understand this but I have no objection to the amendment. I am not conceding it.

The Court: It may be amended.

Mr. Maury: We offer this as paragraph 1-A to the complaint. And possibly for the pleasure of

(Testimony of Malcolm William Mouat.)

the court one more bit of evidence and we will rest.

Redirect Examination

(Continued)

By Mr. Maury:

Q. Mr. Mouat, is that a correct photograph of the Lake and the Lake Placer and the buildings as they existed at the period prior to March 1st, 1946?

A. Yes, sir.

Mr. McKevitt: Would you be more definite in describing the date?

Q. In the fall of 1945 would that be correct?

A. Yes, that would be a very correct picture.

Mr. McKevitt: I understood you to say in the fall of 1945?

Mr. Maury: Yes, in the fall of 1945.

Mr. Lamb: We have no objection to that, your Honor.

The Court: Very well.

(Whereupon, said Plaintiff's Exhibit No. 6, being a picture of Mouat camp, offered and received in evidence, is a part of this record.)

The Court: What is the elevation?

The Witness: 6800.

Mr. Maury: Plaintiff rests.

Mr. Lamb: Your Honor, I still have a little cross-examination.

The Court: Very well.

Recross-Examination

By Mr. Lamb:

Q. Mr. Mouat, as I understand this particu-

(Testimony of Malcolm William Mouat.)

lar photograph marked Plaintiff's Exhibit 6 was taken along some time in the fall of 1945, is that correct? A. I don't get that.

Mr. Maury: He said it was a correct representation.

Mr. Lamb: I will handle my cross-examination, Mr. Maury, thanks.

Q. (By Mr. Lamb): When was the picture taken, do you know?

A. No, I do not. It was taken for the Government, enlarged for the Government so the gentleman that gave it to me told me.

Q. And you don't know when it was taken?

A. No.

Q. Was there any additional construction after this particular photograph in this area shown here? A. I don't think so.

Q. And that this was the conditions as you testified that were found in the fall of 1945?

A. Yes, and when they quit building we have thousands of pictures of different parts of that town and different angles and airplane pictures.

Q. This is not an airplane picture?

A. No, it was taken with a very cheap camera.

Q. Mr. Mouat, since February 28th, 1946, you received a notice of cancellation, did you not, on or about that date?

A. I think that is the date, yes.

Q. All right, after that date were you ever up on this particular property other than the day or two you testified to?

(Testimony of Malcolm William Mouat.)

A. Many, many times.

Q. And did you actually go up to tunnel 5 and tunnel 2 after February 28th up to the present time?

A. Oh, yes, many times.

Mr. Lamb: That is all.

Mr. Maury: That is all.

Mr. Maury: Plaintiffs rest. [160]

Mr. McKevitt: Your Honor, the defendant moves for judgment dismissing the complaint on the grounds plaintiff's proof has not established his cause of action.

The Court: Well, the court will take that under advisement. You may proceed with your defense.

Mr. McKevitt: If the court please, in outlining the defendant's case we started as I explained yesterday with two or three issues in this case. The first question is the issue of royalties, Reconstruction Finance Corporation paying minimum royalties for the years 1944 and 1945. That is after War Production Board had told them to cease production at the present time. That was practically a matter of law. But in order to establish action taken by War Production Board action to Reconstruction Finance Corporation I have certified copies of documents which show that picture. This first document is certified copy, under the Act of Congress, of letter from Mr. Batcheller, Operations Vice Chairman, War Production Board to The Secretary of Commerce in which the Secretary of Commerce acting for Reconstruction Finance Corporation was instructed to cease operations at the

Mouat Mine. I might read just the last paragraph:

“In view of the present stringent manpower situation and the lack of need for Montana concentrates as outlined above, we believe it advisable to divert the men now employed in mining low grade chrome concentrates in Montana into the production of more critically needed materials such as copper and zinc. [161] We, therefore, request that you shut down all operations at the Benbow and Mouat-Sampson properties except for such maintenance men as are necessary to keep both mines and mills in sufficiently good condition so that either or both operations could be revived in the event that the chromite picture should change for the worse.”

Mr. McKevitt: In other words, telling them to cease operations but keep it in standby condition.

Mr. Maury: Are you offering it?

Mr. McKevitt: I am offering it.

Mr. McKevitt: Your Honor, this is a series. Perhaps I had better have it marked for identification. Are you going to object?

Mr. Maury: Yes, certainly.

Mr. Maury: I take it the court will rule later on all these objections but it is incumbent upon us to make them specifically as they come.

The Court: Yes.

Mr. Maury: We object to the introduction of the Defendant's Exhibit No. 7. Not that it is not properly certified, your Honor. We are not basing any objection on the certificate because the certi-

fication is according to the rule. But section 24 of the lease does not absolve upon a mere request. "Section 24. Anything in this lease contained to the contrary notwithstanding, any strike, lockout, difference with workmen, accident, fire, explosion, flood, earthquake, embargo, mobilization, war, foreign war, hostility, riot, requirement, regulation, restriction or other act of any government or governments, whether legal or otherwise, acts of public enemies, the elements, force majeure, inability to secure or delay in securing cars, labor, raw materials, fuel or other supplies or materials or electric power necessary for the operation of the leased premises or the operation of Lessee's facilities, failure of the ore supply or loss of the ore body in the said leased premises or inability to secure sufficient ore of the grade required for concentrating from the said leased premises, unforeseen metallurgical or milling delays, delays or interruptions in transportation by rail, water or otherwise, damage to or destruction of such mines or plants or other operating facilities and any other contingency, whether or not of the nature or character hereinbefore specifically enumerated, which is beyond the control of Lessee or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist." [163]

Mr. Maury: Now that a request is not something beyond the control of the lessee, the Met-

als Reserve or the Reconstruction Finance Corporation, and this letter is not shown to have been ever delivered to the Reconstruction Finance Corporation. It is addressed to The Honorable Secretary of Commerce, and is signed H. G. Batcheller, Operations Vice Chairman. And we further object that it is not relevant because paragraph 24 granting everything it says is repugnant to the main purposes of the lease, that is to say, \$10,000 a year minimum royalty as long as the lease was in existence.

Mr. Lamb: If the court please, as Mr. McKevitt stated, this is merely one item of a series to show the authority and control of the Federal Government over the particular operations here, and as Mr. Maury has stated in paragraph 24 the lessee is relieved by reason of other act of any Government or Governments. And we are showing through a series of the acts of a Government, the United States Government, that lead to the shutdown and the holding of this particular property as surplus. And this is merely one exhibit of a series to show the chain in which that particular order came. We have about fifty different exhibits that will show every major detail and every minor detail of this particular chain, but we have picked the major ones that will show the chain rather than encumber [164] the record with a whole group.

Mr. McKevitt: Your Honor, it comes to this, a lot of it is a matter of law and not matter of proof.

The Court: That is true and it would be a matter of argument later on. I am not prepared to say it should be eliminated or should be received at this time subject to your objection. It may be material, may be something in them.

Mr. Maury: Yes.

The Court: And I think they should be received subject to your objection.

Mr. Maury: Subject to our objection to all of this line and we may specify further when the documents are submitted to us. We are sorry to delay matters but we do want to——

The Court: You may renew that objection in your argument and it will be considered.

Mr. Maury: As to the materiality of these documents.

Mr. Shone: And our objection goes to each one of these instruments.

The Court: I understand.

Whereupon said Defendant's Exhibit No. 7, being War Production Board letter dated September 13, 1943, by H. G. Batcheller, Operations Vice Chairman, to The Secretary of Commerce, Washington, D. C., is in words and figures as follows, to-wit: [165]

DEFENDANT'S EXHIBIT No. 7

(Certificate)

War Production Board, Washington, D. C.

September 13, 1943

Please Prepare Reply

For Mr. Jones

Signature

In reply refer to:

The Honorable

The Secretary of Commerce

811 Vermont Avenue, NW.

Washington, D. C.

My dear Mr. Secretary:

On September 4, 1943, Metals Reserve Company wrote us a letter outlining the present status of the Government's chromite operations in Montana at the Benbow and Mouat-Sampson properties and requested our recommendations concerning further development and production from these properties.

As a background for our recommendations it is perhaps desirable to review some of the history of these operations and the original reasons for our sponsorship.

Three years ago the entrance of Italy into the war greatly restricted our access to the important chromite deposits of Turkey, Yugoslavia, Greece and Cyprus through the withdrawal of all American shipping from the Mediterranean. While some British and neutral ships continued to move small quantities of ore it was clear that none of these sources could be considered safely accessible. At

Defendant's Exhibit No. 7—(Continued)

that time the Defense Commission [166] started negotiations for the development of chromite production from the Benbow property in Montana and asked Metals Reserve Company to take this property over and operate it.

During the spring of 1941 the OPM took further steps to stimulate production of chromite concentrates in Montana and negotiations were undertaken with owners of the Mouat-Sampson properties. At the same time Metals Reserve Company, United States Geological Survey and the Bureau of Mines were asked to explore the entire chromite belt in Stillwater and Sweetgrass Counties, Montana, to find out whether other properties warranted development. Except for the Benbow and Mouat-Sampson properties, nothing of interest was discovered.

When Japan attacked the United States the chrome supply picture, which had previously appeared serious enough to warrant vigorous exploration of the Montana chromite area and the putting into operation of one mine, became very much more critical. War with Japan immediately cut off one of the few remaining sources, the Philippine Islands, and gave every prospect of cutting off New Caledonia. Also, as late as the middle of 1942 the penetration of the Japanese fleet into the Bay of Bengal indicated the possible loss of Madagascar with consequent blockade of our only remaining large sources of chromite, Southern Rhodesia and the Union of South Africa. Under such

Defendant's Exhibit No. 7—(Continued)

circumstances there seemed to be no choice but to attempt to make the United States completely self-sufficient at almost any [167] cost. It was at that time the WPB asked Metals Reserve Company to build for maximum production of chromite concentrates from the Benbow and Mouat-Sampson properties.

This recast of the story is made to show that the very large investment by the Government in developing Montana chromite production was the natural reaction to a real threat which fortunately did not materialize. Had we lost Madagascar and New Caledonia and ready access to the Mediterranean as well, it is a fair assumption that we would now be producing chromite as fast as we could in Montana.

Actually in spite of all threats to our supply, and in spite of rising consumption, total stocks in the country rose from approximately 675,000 tons in the summer of 1940 to a peak of 1,200,000 tons in January, 1943. Since then they have declined only modestly to a total of 1,110,000 tons and a part of this decline has been due to the deliberate withdrawal of ships from the South African trade in order to help out the movement of other more scarce commodities.

It now seems more than probable that we will be able to continue to supply all of our chromite needs without calling upon any production from the Montana chromite deposits. It should be noted that the Montana chrome concentrates are very

Defendant's Exhibit No. 7—(Continued)

much inferior to imported grades of chromite. The Montana concentrates are of no value in the manufacture of refractory brick. In the manufacture of chrome chemicals they are enough [168] lower in grade than the Transvaal ores so that enforced use of Montana concentrates would lower the production of chromium chemicals seriously at a time when manpower conditions make it almost impossible to maintain full operation. For metallurgical purposes the ores are even more unsuitable and would require the erection of a costly beneficiation plant before any of them could be used. Therefore, it is not only impracticable to use the Montana concentrates at present but probably such use will never be necessary. We view the Montana chromite development now only as insurance against some future emergency in which case the existence of producing capacity is just as valuable as would be the existence of stockpiled production.

In view of the present stringent manpower situation and the lack of need for Montana concentrates as outlined above, we believe it advisable to divert the men now employed in mining low grade chrome concentrates in Montana into the production of more critically needed materials such as copper and zinc. We, therefore, request that you shut down all operations at the Benbow and Mouat-Sampson properties except for such maintenance men as are necessary to keep both mines and mills in sufficiently good condition so that either or both

Defendant's Exhibit No. 7—(Continued)
operations could be revived in the event that the
chromite picture should change for the worse.

Sincerely yours,

/s/ H. G. BATCHELLER,

Operations Vice Chairman.

Mr. McKevitt: This may take quite a while.

The Court: We will take a recess. You can
see all of them and let them be received subject
to your objection.

Mr. Maury: We can pick them out and specify
subject to our objection.

The Court: Yes.

(Whereupon said Defendant's Exhibits Nos.
8 to 21, inclusive (except Defendant's Exhibits
Nos. 18 and 19 having been later withdrawn),
are a part of this record, and are in words and
figures as follows, to wit:) [170]

DEFENDANT'S EXHIBIT No. 8

(Certificate)

War Production Board

Washington, D. C.

March 8, 1944

In reply refer to:

Ferroalloys Branch

Room 1412-A

Social Security

Building

Received March 11, 1944

D.P.C. Administrative

Division

Defendant's Exhibit No. 8—(Continued)

Mr. Hans A. Klagsbrunn
Executive Vice President
Defense Plant Corporation
Washington, D. C.

Dear Mr. Klagsbrunn:

With further reference to your inquiry as to whether we were interested in maintaining the Benbow and Mouat-Sampson chrome properties in Montana in stand-by condition, I am writing you to advise you that it is our decision to continue to hold these plants in stand-by condition.

We have, upon written request from Metal Reserve Company and also from Mr. A. W. Greely, Assistant Chief Engineer of Defense Plant Corporation, loaned some equipment for use at other essential government projects. However, this has been done only with a specific understanding that such materials are to be kept "ear-marked" and held available for return to the Benbow or Mouat operations, if we decide to re-open these properties.

Very truly yours,

/s/ OLAF N. ROVE,

OLAF N. ROVE

Ferroalloys Branch. [171]

DEFENDANT'S EXHIBIT No. 9

(Certificate)

War Production Board, Washington 25, D. C.

Oct. 6, 1944.

In reply refer to:

The Honorable

The Secretary of Commerce

811 Vermont Avenue, N. W.

Washington 25, D. C.

My dear Mr. Secretary:

In September, 1943, we recommended that Metals Reserve Company shut down the Benbow and the Mouat-Sampson Chrome Mines and Mills near Columbus, Montana. At the same time it was recommended that the facilities be held in stand-by condition as protection against a possible future emergency which might necessitate our reopening these operations.

There is some possibility that we may utilize, as an emergency substitute for Transvaal ores in case new imports of the latter are not available to the chemical industry, some of the present stocks of Benbow concentrates during the second half of 1945. These stocks plus Mouat-Sampson and Coquille, Oregon, concentrates will be sufficient, when "upgraded" with higher-grade concentrates, to last at least through 1945. In view of the present chrome ore supply position plus gradually improving shipping conditions, we no longer consider it essential to the present War Effort to maintain the Benbow Mine and Mill in stand-by condition. [172]

Defendant's Exhibit No. 9—(Continued)

We recommend that the Benbow Mine, Mill, and associated other facilities including the Benbow Housing Project, be declared as surplus property. We further recommend that the Mouat-Sampson Mine, Mill, and associated facilities continue to be held in a stand-by condition for the present, but upon termination of the European War, the chrome situation will be reviewed to determine whether the Mouat-Sampson can then be declared surplus property.

Sincerely yours,

/s/ PHILIP D. WILSON,

PHILIP D. WILSON,

Vice Chairman for Metal
and Minerals. [173]

DEFENDANT'S EXHIBIT No. 10

(Certificate)

War Production Board, Washington, D. C.

Feb. 24, 1945.

In reply refer to:

The Honorable

Charles B. Henderson

Chairman, Reconstruction Finance Corporation

811 Vermont Avenue, N. W.

Washington, D. C.

Dear Mr. Henderson:

Subject: Release of Facilities on Plancor 587

Anaconda Copper Mining Company

Columbus, Montana

Defendant's Exhibit No. 10—(Continued)

The four letters of January 29, 30, and February 6, 1945, written by Mr. R. G. Rhett, Chief, Industrial Facilities Section, Surplus War Property Division, Defense Plant Corporation, requesting the release of certain facilities on subject Plancor, have been noted.

This is to advise that this Agency recommends the continuation of a standby status of this Plancor as insurance against any possible emergency.

However, as the Plancor can be placed in operation without the hospital equipment and additional mine timber, it is suggested, therefore, that Defense Plant Corporation make such disposition of these two facilities as it may deem appropriate.

Sincerely yours,

J. A. KRUG,

Chairman

By /s/ ROBERT A. IRWIN,

ROBERT A. IRWIN,

Director, Procurement Policy
Division.

Attachment [174]

DEFENDANT'S EXHIBIT No. 11

(Certificate)

War Production Board, Washington, D. C.

Apr. 14, 1945.

In reply refer to:

The Honorable

Charles B. Henderson, Chairman

Defendant's Exhibit No. 11—(Continued)

Reconstruction Finance Corporation

811 Vermont Avenue, N. W.

Washington, D. C.

Subject: Anaconda Copper Mining Company,

New York, New York.

Location of Project: Mouat-Sampson Chrome Mine, Columbus, Montana.

Description: Facilities for Production of Chrome Ore.

Present Authorization: \$8,358,890.00.

Plancor No. 587.

Dear Mr. Henderson:

The Mouat-Sampson Chrome Mine was developed through federal financing by the Anaconda Copper Mining Company, acting as agents for Metals Reserve Company, with a lease agreement dated February 24, 1942. The present authorization is \$8,358,890. The objective of this Plancor was to develop a supply of low grade chrome ore, which could be utilized in an emergency.

The Mouat-Sampson Mine, mill and related facilities have been shut down and maintained in a standby condition since December 31, 1943. There is a large amount of mining and [175] milling equipment on this Plancor, most of which has been used only a short time, that is urgently needed for other operations.

As the facilities pertaining to this Plancor are not now necessary for the war effort, this Agency

Defendant's Exhibit No. 11—(Continued)
suggests that the Defense Plant Corporation make such disposition of these facilities as it may deem appropriate.

Sincerely yours,

J. A. KRUG,

Chairman

By /s/ ROBERT A. IRWIN,

ROBERT A. IRWIN,

Director, Procurement Policy
Division.

Attachment [176]

DEFENDANT'S EXHIBIT No. 12

(Certificate)

War Production Board, Washington 25, D. C.

November 2, 1945

In reply refer to:

Dear Mr. Henderson:

On July 8, 1941, the Office of Production Management, in a letter from Mr. E. R. Stettinius, Jr., to the Honorable Jesse H. Jones, Federal Loan Administrator, requested that the Defense Plant Corporation and the Metals Reserve Company proceed with negotiations for the production of chromite from the so-called Mouat-Sampson properties in Stillwater County, Montana, a project considered of high importance to the defense program. In due course lease arrangements for these properties were completed by the Metals Reserve Company and arrangements were made for the Anaconda Copper Mining Company to develop and operate these

Defendant's Exhibit No. 12—(Continued)

mines. Facilities for the operation were provided by Defense Plant Corporation (now the Office of Defense Plants) under Plancor No. 587.

On April 14, 1945, the War Production Board advised your office that the facilities pertaining to Plancor No. 587 were no longer necessary for the war effort, and suggested that Defense Plant Corporation make such disposition of these facilities as it might deem appropriate.

It has recently been brought to our attention by the Office [177] of Metals Reserve that, in the absence of a specific recommendation from the War Production Board, no action has been taken to terminate the lease for the properties on which this project is located. The operation of these properties is not required to satisfy either military or civilian demands. It is therefore recommended that the Office of Metals Reserve take such action with respect to the lease for the Mouat-Sampson Chrome Mine properties as it may deem appropriate.

Sincerely yours,

/s/ J. A. KRUG,

J. A. KRUG,

Chairman.

The Honorable

Charles B. Henderson

Acting Federal Loan Administrator

Federal Loan Agency

811 Vermont Avenue, N. W.

Washington 25, D. C. [178]

DEFENDANT'S EXHIBIT No. 13

(Certificate)

Metals Reserve Company

Washington, D. C.

Apr. 8, 1944

Mrs. May Paula Mouat,
Mr. M. W. Mouat, and
Mrs. May Paula Mouat, as Trustee
Columbus, Montana

Dear Mr. and Mrs. Mouat:

Our Supervising Engineer, Mr. Cecil B. Hull, at Columbus, Montana, has written us that you recently inquired of him when you "might expect the first quarter minimum royalty payment" under our Lease dated December 20, 1941.

Under date of December 11, 1943, we informed you that, pursuant to action taken by the War Production Board, operations at the Mouat-Sampson properties had been suspended.

Section 7 of the Lease calling for payment of minimum royalties provides that should our mining or milling operations or any other operation be suspended because of any of the causes or reasons set forth in section 24, our obligation to pay a minimum royalty shall be suspended during any and all periods were such causes or reasons exist and the obligation to pay such minimum royalty shall be reduced in such proportion as the period of suspension of operations bears to the entire calendar year. [179]

Section 24 provides, among other things, that

Defendant's Exhibit No. 13—(Continued)

anything in the Lease to the contrary notwithstanding, any requirement, regulation, restriction or other act of any government, whether legal or otherwise, force majeure, inability to secure or delay in securing labor, and any other contingency which is beyond our control or which delays or interferes with the performance of the agreement shall be considered sufficient justification for delay in such performance until such cause ceases to exist.

As you know, the War Production Board is empowered to exercise general direction over the war procurement and production program to determine the policies, plans, procedures and methods of the several federal departments, establishments and agencies in respect to war procurement and production and to issue such directives in respect thereto as are deemed necessary or appropriate; its decisions are final and all federal departments, establishments and agencies are required to comply therewith.

As advised in our letter of December 11, 1943, during the time operations are suspended, we will continue to keep the mine and mill in such condition that operations can be resumed upon request of the War Production Board.

Very truly yours

/s/ HDS

H. DeWITT SMITH,

Executive Vice President.

ASH:LM

File Copy [180]

Defendant's Exhibit No. 13—(Continued)

Metals Reserve Company

Washington 25, D. C.

Dec. 11, 1943.

Registered Mail—

Return Receipt Requested

Mrs. May Paula Mouat,

Mr. M. W. Mouat, and

Mrs. May Paula Mouat, as Trustee,
Columbus, Montana.

Dear Mr. and Mrs. Mouat:

In a letter dated September 13, 1943, discussing the chrome situation in general and the chrome projects undertaken by Metals Reserve Company in Montana in particular, in connection with the war effort of the Government of the United States, the War Production Board stated that, in view of the present stringent manpower situation and the lack of need for Montana concentrates, it believed it advisable to divert the men now employed in mining low grade chrome in Montana into the production of more critically needed materials. The War Production Board therefore requested us to shut down operations at the Mouat-Sampson properties, covered by the lease from you dated December 20, 1941, and also to shut down operations at the Benbow Mine, except for such maintenance men as are necessary to keep both mines and their respective mills in sufficiently good condition so that either or both operations could be revived in the event that the chromite picture should change for the worse. [181]

Defendant's Exhibit No. 13—(Continued)

As you know, Metals Reserve Company, as a federal agency created to aid the Government of the United States in the national defense program and war effort, is obligated to comply with the policies, plans, methods and procedures in respect to war procurement and production as determined by the Chairman of the War Production Board. Under the circumstances Metals Reserve Company has complied with the above mentioned directive and has suspended all operations in and about the premises covered by the above mentioned lease and commonly known as the "Mouat-Sampson properties." A crew of men is being maintained to protect the property. Like action has also been taken in respect of the Benbow Mine.

Very truly yours,

METALS RESERVE
COMPANY

By

G. TEMPLE BRIDGMAN

Executive Vice President

ASH:LM

File Copy

[182]

DEFENDANT'S EXHIBIT NO. 14

(Certificate)

War Production Board

Washington, D.C.

July 5, 1943

Office of

DONALD M. NELSON

Chairman

Dear Mr. Jones:

Mr. Ralph J. Cordiner has resigned as Vice Chairman of the War Production Board, Mr. Donald D. Davis has taken his place, and Mr. Hiland G. Batcheller has taken the position of Operations Vice Chairman.

Accordingly, this will cancel, effective today, the authorization given to you for Mr. Cordiner, and will instruct you to accept the signatures of Mr. Donald D. Davis as Vice Chairman and of Mr. Hiland G. Batcheller as Operations Vice Chairman on recommendations that are made by the War Production Board to the Reconstruction Finance Corporation and its subsidiaries.

Sincerely yours,

/s/ D. M. NELSON

DONALD M. NELSON

Honorable Jesse Jones

Secretary of Commerce

Washington, D. C. [183]

Defendant's Exhibit No. 14—(Continued)

War Production Board
Washington, D. C.

Dec. 17, 1943

In reply refer to:

The Honorable
Secretary of Commerce
811 Vermont Avenue, N. W.
Washington, D. C.

Dear Mr. Secretary:

On July 5, I authorized you to accept the signature of Mr. Hiland G. Batcheller as Operations Vice Chairman, War Production Board, on recommendations to the Reconstruction Finance Corporation and its subsidiaries.

Mr. Batcheller has resigned and Mr. L. R. Boulware has been appointed Operations Vice Chairman. This will authorize you to accept Mr. Boulware's signature, which appears below, in place of Mr. Batcheller's.

Sincerely yours,

/s/ C. E. WILSON

C. E. WILSON

Executive Vice Chairman

/s/ L. R. BOULWARE

L. R. BOULWARE

Operations Vice Chairman

Defendant's Exhibit No. 14—(Continued)

War Production Board

Washington, D. C.

Jan. 7, 1944

Office of Donald M. Nelson, Chairman

Dear Jesse:

The new position of Vice Chairman for Metals and Minerals was created in the War Production Board of December 23, 1943. Mr. Arthur H. Bunker was appointed to the post on the same date. Accordingly, this will authorize you to accept, as of December 23, 1943, Mr. Bunker's signature as Vice Chairman for Metals and Minerals on recommendations from the War Production Board to the Reconstruction Finance Corporation and its subsidiaries with respect to the matters outlined in my letter to you of November 16, 1942.

For your guidance, please be advised that recommendations to close down a Defense Plant Corporation plant, to cancel a Defense Plant Corporation lease or other management agreement, or to cancel or modify a materials purchase program should be accepted when made by those War Production Board officials now authorized to recommend the construction, lease, agreement, or purchase, as the case may be.

Sincerely yours,

/s/ D. M. NELSON

DONALD M. NELSON

Honorable Jesse Jones

Secretary of Commerce

Washington, D. C. [185]

Defendant's Exhibit No. 14—(Continued)
War Production Board
Washington, D. C.

June 20, 1944

In Reply Refer to:

Dear Jesse,

On January 7, 1944 I informed you that Mr. Arthur H. Bunker had been appointed to the position of Vice Chairman for Metals and Minerals of the War Production Board.

Mr. Bunker is leaving this post, and his place is being taken by Mr. Philip D. Wilson. Accordingly this will authorize you to accept, as of June 20, Mr. Philip D. Wilson's signature as Vice Chairman for Metals and Minerals.

Sincerely yours,

/s/ D. M. NELSON

DONALD M. NELSON

Honorable Jesse Jones
The Secretary of Commerce
Washington, D. C. [186]

War Production Board
Washington 25, D. C.

February 3, 1945

In reply refer to:

Dear Mr. Secretary:

I have authorized Mr. Robert A. Irwin, as Director of the Procurement Policy Division of the War Production Board, to approve in my name recommendations made by the War Production Board to the Reconstruction Finance Corporation or its

Defendant's Exhibit No. 14—(Continued)

subsidiaries for the financing by the Defense Plant Corporation of specific projects, involving construction of plants, acquisition of machinery and equipment, and installation of specific facilities, or plant acquisition or rehabilitation.

This will authorize you, therefore, to accept the signature of Mr. Irwin, in his named capacity, on recommendations of the kind described above. His signature, for your records, appears below. All previous delegations which include authority to approve and sign recommendations of the kind described above have been amended to exclude such authority.

Sincerely,

/s/ J. A. KRUG,
J. A. KRUG,
Chairman.

(Signed)

ROBERT A. IRWIN

ROBERT A. IRWIN

The Honorable

The Secretary of Commerce

Washington, D. C.

War Production Board

Washington, D. C.

February 24, 1945

In reply refer to:

Dear Senator Henderson:

This is in reply to your letter of January 27, 1945, requesting a revised list of those officers of the War

Defendant's Exhibit No. 14—(Continued)

Production Board authorized to sign recommendations to the Reconstruction Finance Corporation or its subsidiaries. This letter supersedes all previous letters with respect to signature authorizations covering recommendations made by the War Production Board to the Reconstruction Finance Corporation or its subsidiaries.

I. The signature authorizations of Harold Boeschstein, Operations Vice Chairman, and Philip D. Wilson, Vice Chairman for Metals and Minerals, are to be recognized in connection with the following principal categories of recommendations:

(1) for the purchase of materials or their release to industrial consumers;

(2) for payments on over-quota production of copper, lead or zinc;

(3) for the financing of programs for the redistribution of materials;

(4) pertaining to the operations of a DPC facility. [188]

II. The signature authorization of Edward J. Browning, Director of the Bureau of Stockpiling and Transportation, is to be recognized in connection with recommendations involving purchasing of materials or commodities or their release to industrial consumers.

Defendant's Exhibit No. 14—(Continued)

III. The signature authorization of Robert A. Irwin, Director of the Procurement Policy Division, is to be recognized in connection with recommendations for the financing of a specific project involving construction of plants, acquisition of machinery and equipment, installation of specific facilities, or plant acquisition or rehabilitation by the Defense Plant Corporation. He will also advise the Defense Plant Corporation that a specific project or facility is no longer essential for war production.

IV. The signature authorizations of Robert A. Irwin, Director of the Procurement Policy Division and John G. Hager, Chief of the Requisitioning Branch of the Procurement Policy Division, are to be recognized in connection with recommendations made under the requisitioning acts as more fully set forth under my Delegation of Powers to them dated December 19, 1944, a copy of which is attached to this letter.

V. The signature authorization of J. Joseph Whelan, Recording Secretary, is to be recognized on allocations of materials to individual purchasers.

VI. In addition the appropriate Bureau or Division [189] Director my advise the R. F. C. subsidiaries with respect to the release of materials purchased and held by them to individual consumers where the material is no longer under allocation.

The signature authorization of Hiland G. Batcheller, Chief of Operations, is to be recognized in connection with any recommendation addressed by

Defendant's Exhibit No. 14—(Continued)
the War Production Board to the Reconstruction
Finance Corporation or its subsidiaries.

Very truly yours,

/s/ J. A. KRUG,

J. A. KRUG, '
Chairman.

Honorable Charles B. Henderson
Chairman of the Board
Reconstruction Finance Corporation
Washington, D. C.

Attachment [190]

DEFENDANT'S EXHIBIT No. 15

(Certificate)

Nov. 15, 1945

Registered Mail—

Return Receipt Requested

Mrs. May Paula Mouat, Mr. M. W. Mouat
and Mrs. May Paula Mouat, as Trustee,
Columbus, Montana

Dear Mr. and Mrs. Mouat:

Pursuant to Public Law 109, 79th Congress, approved June 30, 1945, Metals Reserve Company was dissolved effective July 1, 1945, and all of its functions, powers, duties and authority, together with its documents, books of account, records, assets and liabilities of every kind and nature were transferred to Reconstruction Finance Corporation to be performed, exercised and administered by Reconstruction Finance Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation.

Under date of November 2, 1945, the War Production Board wrote us that the operation by us of the properties covered by the lease from you dated December 20, 1941, is not required to satisfy either military or civilian demands. Therefore, Reconstruction Finance Corporation hereby gives notice of its intention to surrender, terminate and cancel, and does hereby surrender, terminate and cancel that certain lease dated the 20th day of December, 1941, covering certain mining property in Stillwater

Defendant's Exhibit No. 15—(Continued)

County, Montana, wherein you are Lessors [191] and Metals Reserve Company is Lessee, said surrender, termination and cancellation to be and become effective on February 28, 1946.

As provided in paragraph 14 of the lease, we are making payment of the sum of \$1,000 to the Yellowstone Bank, Columbus, Montana, for payment by said Bank to Mrs. May Paula Mouat, as Trustee. Enclosed is copy of our letter to the Yellowstone Bank.

For your information, please be advised that we are also cancelling our lease from Dr. Edward Sampson.

Very truly yours,

RECONSTRUCTION FINANCE
CORPORATION,

By,

Executive Director,

Office of Metals Reserve.

Enclosure

ASH:LM

File Copy

Please attach enclosed receipt to File copy of our letter dated November 15, 1945, addressed to May Paula Mouat, M. W. Mouat and May Paula Mouat, as Trustee.

* * *

(Defendant's Exhibit No. 15—(Continued))

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

/s/ MAY PAULA MOUAT.

M. W. MOUAT

(Signature or Name of
Addressee.)

.....

(Signature of Addressee's Agent—Agent Should
Enter Addressee's Name on Line One Above.)

Date of delivery, 11-19-1945.

* * *

Post Office Department.

Penalty for private use to avoid payment of postage \$300.

Postmark of Delivering Office.

Return to Reconstruction Finance Corporation.

Street and Number or Post Office Box. Name
of Sender 666.

Registered Article 786814.

Insured Parcel.

Washington, D. C.

73-a Mr. Hutchinson. [193]

DEFENDANT'S EXHIBIT No. 16

Executive Order

Transferring Functions of the Federal Loan Agency
to the Department of Commerce.

Whereas by an Executive order issued this date

Defendant's Exhibit No. 16—(Continued)

under Title I of the First War Powers Act several agencies were transferred from the Federal Loan Agency to the National Housing Agency established by such order, and it is deemed advisable that the remaining functions of the Federal Loan Agency be administered in the Department of Commerce;

Now, therefore, by virtue of the authority vested in me by Title I of the First War Powers Act, 1941, approved December 18, 1941, it is hereby ordered as follows:

Sec. 1. Transfer of Functions. All functions, powers, and duties of the Federal Loan Agency and of the Federal Loan Administrator which relate to the Reconstruction Finance Corporation, Electric Home and Farm Authority, RFC Mortgage Company, Federal National Mortgage Association, Disaster Loan Corporation, Export-Import Bank of Washington, Defense Plant Corporation, Rubber Reserve Company, Metals Reserve Company, Defense Supplies Corporation, and War Insurance Corporation, together with all other functions, powers, and duties not transferred by the Executive order establishing the National Housing Agency, are transferred to the Department of Commerce and shall be administered under the direction and supervision of the Secretary of Commerce. [194]

Sec. 2. Transfer of Records, Property, and Personnel. All records and property (including office

Defendant's Exhibit No. 16—(Continued)

equipment) and all personnel of the Federal Loan Agency used in the administration of the functions transferred by this order are transferred to the Department of Commerce for use in the administration of the functions transferred by this order.

Sec. 3. Transfer of Funds. So much of the unexpended balances of the appropriations, allocations, or other funds available or to be made available for the use of the Federal Loan Agency in the exercise of any function transferred by this order, as the Director of the Bureau of the Budget with the approval of the President shall determine, shall be transferred to the Department of Commerce for use in connection with the exercise of the functions so transferred. In determining the amount to be transferred the Director of the Bureau of the Budget may include an amount to provide for the liquidation of obligations incurred against such appropriations, allocations, or other funds prior to the transfer.

Sec. 4. Effective and Termination Dates. This order shall become effective as of the date hereof and shall continue in force and effect until the termination of Title I of the First War Powers Act, 1941.

FRANKLIN D. ROOSEVELT.

The White House,

February 24, 1942.

No. 9071

DEFENDANT'S EXHIBIT NO. 17
(Certificate)

Telegram

Metals Reserve Company
Washington, D.C.

September 16, 1943

Via Commercial Wire

Anaconda Copper Mining Company
Attention C. E. Weed, Vice President
Butte, Montana

Upon request of War Production Board and in view of general chrome position and present general manpower shortage we ask you to proceed as follows re Benbow and Mouat-Sampson operations.

1. Close down Benbow mine and plant completely, maintaining guards and otherwise seeing that property is properly protected.

2. Close down Mouat mine as quickly as orderly transfer of personnel to more critical mineral production will permit with view of stopping milling approximately November first. Maintain sufficient men to keep entire plant in operating condition and underground working in good repair. All arrangements of shut-down should be such that production

Defendant's Exhibit No. 17—(Continued)
can be resumed with reasonable promptness upon
notice from us to reopen. Letter follows.

G. TEMPLE BRIDGMAN

Executive Vice President

Metals Reserve Company

WWL-ASH:LM

File Copy

[196]

Metals Reserve Company

Washington, D. C.

September 22, 1943

Mr. C. E. Weed

Vice President

Anaconda Copper Mining Company

Butte, Montana

Dear Mr. Weed:

The War Production Board notified us on September 13, 1943 that in view of the stringent manpower situation and the lack of need for Montana concentrates under existing circumstances, they believe it advisable to divert the men now employed in mining low grade chrome concentrates in Montana into the production of more critically needed materials such as copper and zinc. The Board therefore requested that we "shut down all operations at the Benbow and Mouat-Sampson properties except for such maintenance men as are necessary to keep both mines and mills in sufficiently good condition so that either or both oper-

Defendant's Exhibit No. 17—(Continued)

ations could be revived in the event that the chromite picture should change for the worse." Accordingly, we telegraphed you instructions on September 16 to accomplish this purpose.

You will note that the request of the War Production Board does not differentiate between Benbow and Mouat as to the extent of maintenance during the shut-down, whereas the instructions of our wire of September 16 are not identical for the two operations. We believe that our instructions will accomplish fully the War Production Board's intent, in that if need arises Benbow can be put in operating condition after Mouat has attained [197] capacity production.

As regards Benbow, we concur with the procedure outlined in paragraphs "(a)", "(b)" and "(c)" of your letter of September 4, 1943, and ask you to proceed, generally, in this manner. You appreciate, however, that careful regard must be given to Paragraph 27 of the Benbow lease dated May 27, 1941, and Paragraph 13 of the Timmins Agreement of same date. Before making any tender of supplies or equipment, please furnish us with a list of the items which you recommend to be sold, together with the undepreciated and depreciated value of each item. Items owned by Metals Reserve Company should be listed separately from items owned by Defense Plant Corporation. Any supplies or pieces of equipment which are to be removed from Benbow and stored at Mouat should be properly labeled for easy identification as having

Defendant's Exhibit No. 17—(Continued)

been removed from Benbow, and Defense Plant items should be stored separately from Metals Reserve items.

If operations at either or both of the mines are to be renewed at some future time, we are of opinion that attention first should be given to the opening of Mouat. Therefore, we are inclined to dispose of only such supplies and equipment of Mouat as could properly be classed as "surplus" in relation to operations on a basis of 2,000 tons per day. Perishable and supplies and equipment which could be replaced quickly are excepted from the foregoing. As in the case of Benbow, [198] please furnish us with your detailed recommendations in this regard.

The question arises at this time as to whether it will be advisable to carry through from level to level a stope or two in both the "G" and "H" veins, as suggested by Mr. Browning. We should like to see this done if it can be conveniently fitted in with the general shut-down program. We shall appreciate your views in this regard.

Sincerely yours,

G. TEMPLE BRIDGMAN

Executive Vice President

WWL:MLO

CC—Mr. Bridgman

Mr. Smith

Mr. Levinson

Mr. A. S. Hutchinson

Defendant's Exhibit No. 17—(Continued)

Mr. A. W. Greely (DPC)

Mr. Norton

Mr. Petterson

Mr. Bancroft

Mr. Browning

Mr. Lynch

File Copy

[199]

Telegram

Metals Reserve Company

Washington, D. C.

September 27, 1943

Via Commercial Wire

Anaconda Copper Mining Company

Butte, Montana

Re our telegram September sixteenth. We are of opinion obligation pay minimum royalties Benbow Mouat is suspended and we request that until otherwise advised by us you suspend such payments from and after effective dates of respective shutdown and during period of such shutdown. Leases provide obligation pay minimum royalties shall be suspended during periods where a cause such as request of War Production Board exists and obligation pay such minimum royalties shall be reduced in such proportion as period suspension bears to entire calendar year. We understand no quarterly minimum royalties payable September thirty in

Defendant's Exhibit No. 17—(Continued)
any event is earned royalties ample to meet provisions of leases. Please confirm.

CHARLES B. HENDERSON

President

Metals Reserve Company

ASH:LM

File Copy

[200]

DEFENDANT'S EXHIBIT NO. 20

United States of America—Surplus War Property
Administration

Report of Surplus Real Property
erty

Form SWPA-5

Form Approved

8/1/44

Budget Bureau No. 16-R005

1. To: Reconstruction Finance Corporation, 811 Vermont Avenue, N.W., Washington 25, D.C.

2. From: Defense Plant Corporation, 811 Vermont Avenue, N.W., Washington 25, D.C.

3. Location (Attach map) State Montana, County Stillwater, Municipality Columbus.

4. Disposal Agency No.:.....

5. Authorized Reporting Official—Date: April 16, 1945—/s/ R. G. Rhett. Signature—R. G. Rhett, Chief, Industrial Facilities Sec.

Signature Title

6. Reporting Agency—No.: Plancor 587.

Defendant's Exhibit No. 20—(Continued)

7. Description of Property—General. See appendix attached.

8. Cost of Acquisition \$18,262.80. Estimated cost of Betterments \$8,318,400.

9. Use of Property when acquired—Mining. Opinion of Best Future Use—Mining.

10. Description of Government's Legal Title to Property. Title cleared—Yes [x] No. []. Fee simple title acquired by purchase and condemnation. Portion of facilities constructed on land held under mining claims.

11. Representatives to Contact—Mr. L. E. Choquette, Agent, P. O. Box 177, Helena, Montana, Tel. Helena 481. [201]

Defense Plant Corporation
Surplus War Property Division
Industrial Facilities Section

Plancor No. 587

Anaconda Copper Mining Company
Columbus, Montana

Facilities of this Plancor completely owned by DPC for the production and concentration of chromite ore. Mining claims are under lease agreement.

Property located on improved highway approximately 45 miles southwest of Columbus, Montana, which is the nearest railway shipping point and served by N.P.R.R.

Improvements: Millsite

Defendant's Exhibit No. 20—(Continued)

2000 ton Concentrator Building, table concentration, electric power, completely equipped for operation, sprinkler system, crushing plant, tank house, machine shop, warehouse, carpenter shop, automotive repair shop, metallurgical laboratory and bucking room, office building, 40 ton truck scales building, 1-six and 1 four-stall garage, mess hall, guest building, six bedrooms, first aid building, 1-twenty-bed hospital completely equipped, 2-five-room residences, 1-contagious disease building, community hall, store building, 1-two classroom school, 30-four-room dwellings, 17-three-room dwelling, and 39 temporary housing buildings.

Three phase 50,000 volt transmission line with sub-stations and [202] transformers. Metallic telephone line. Aerial Tramway, steel towers, between concentrator building and mine terminal with 48 bucket assemblies, capacity 1800 lbs. of chrome ore each, equipped for automatic dumping.

Improvements: Mine

Primary and Secondary Ore Bins and Crushing Plant, conveyor trestles and housing, compressor building, carpenter shop, blacksmith and machine shop, office and engineers building, mess hall, change house, warehouse, automotive repair shop, recreation building, 1-eight classroom school, first aid station and nurses' home, store building, post office building, 55-three-room dwellings, 40-four-room dwellings, 55-two-room duplex dwellings, 8-forty-two men, bunk houses; 1-garage and shop building with general repair room, service room;

Defendant's Exhibit No. 20—(Continued)

parts room and office located in Columbus, Montana; one truck storage building located in Columbus, Montana.

Complete mining equipment to develop and operate the mine on a 2000 ton per day production. Complete water and sewerage system; all buildings lighted by electricity; complete fire protection systems at Millsite and Mine.

For further information communicate with:
Defense Plant Corporation
Surplus War Property Division
Industrial Facilities Section
Washington 25, D.C.
L. E. Choquette, Agent
Defense Plant Corporation
P. O. Box 177
Helena, Montana [203]

— — — — —
DEFENDANT'S EXHIBIT NO. 21

11 Fed. Reg. P. 1265

The following is the text of Executive Order 9689, issued by the President on January 31, 1946:

Executive Order

Consolidation Of Surplus Property Functions

Whereas the Surplus Property Administration has now substantially completed the performance of its policy-making functions, the War Assets Corporation is now vested with the major part of domestic surplus property disposal, and the State Department is now vested with the major part of foreign surplus property disposal; and

Defendant's Exhibit No. 21—(Continued)

Whereas, after a reasonable period in which to make necessary administrative arrangements, it will be feasible and desirable to establish a War Assets Administration as a separate agency directly responsible to the President to exercise consolidated functions relating to the disposal of domestic surplus property;

Now, Therefore, by virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941 (55 Stat. 838), and as President of the United States, it is hereby ordered as follows:

1. The functions of the Surplus Property Administrator and of the Surplus Property Administration are hereby transferred, except as otherwise provided herein, to the chairman [204] of the board of directors of the War Assets Corporation, and to the War Assets Corporation, respectively, and the Surplus Property Administration shall be deemed merged into and consolidated with the War Assets Corporation.

2. All functions of the Surplus Property Administrator and the Surplus Property Administration which relate to surplus property located outside the continental United States, Hawaii, Alaska (including the Aleutian Islands), and Puerto Rico, and the Virgin Islands are transferred to the Secretary of State and the Department of State,

3. Effective March 25, 1946, (a) there shall be respectively.

Defendant's Exhibit No. 21—(Continued)

established, in the Office for Emergency Management of the Executive Office of the President, a War Assets Administration at the head of which there shall be a War Assets Administrator, who shall be appointed by the President by and with the advice and consent of the Senate, and who shall receive a salary at the rate of \$12,000 per annum unless the Congress shall otherwise provide, and (b) the functions of the War Assets Corporation relative to surplus property and of the chairman of the board of directors of the War Assets Corporation relative to surplus property shall be transferred to the War Assets Administrator.

4. There shall be transferred to the agencies to which functions are transferred by this order so much as the Director of the Bureau of the Budget shall determine to relate primarily [205] to such functions, respectively, of the records, administrative property, personnel, and funds of the Surplus Property Administration the Office of War Mobilization and Reconversion, the Reconstruction Finance Corporation, and the War Assets Corporation. "All authorizations, commitments, or other obligations incurred as a disposal agency by the Reconstruction Finance Corporation or by the War Assets Corporation under the Surplus Property Act of 1944 shall be transferred to the War Assets Administration upon its establishment."

Defendant's Exhibit No. 21—(Continued)

5. There shall be subject to the Classification Act of 1923, as amended, those positions transferred to the War Assets Corporation hereunder which are now subject to the said Act, and also all positions transferred to the War Assets administration hereunder; provided that if the salary of the incumbent of any position so transferred to the said Administration is above the maximum of the allocated grade such salary shall not be reduced so long as the position is held by the incumbent. The provisions of section 1 hereof notwithstanding, the respective accounting and fiscal procedures in effect with respect to the functions merged shall continue in effect from February 1, 1946 to March 25, 1946.

6. Such further measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the transfers provided for in this order shall be carried out in such manner as the Director may [206] direct and by such agencies as he may designate.

7. All provisions of prior Executive orders in conflict with this order are amended accordingly. All other prior orders, regulations, ruling, designations, and other actions, relating to any function transferred by this order, shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

8. Nothing in this order shall affect the pro-

Defendant's Exhibit No. 21—(Continued)
visions of section 101 (c) of the War Mobilization and Reconversions Act of 1944 (58 Stat. 785), or of section 10 (b) of the Surplus Property Act of 1944 (58 Stat. 766).

9. The provisions of this order shall, except as otherwise herein specifically provided, be effective as of the opening of business February 1, 1946.

HARRY S. TRUMAN

The White House,
January 31, 1946

The following statement was released together with the Executive Order on February 1, 1946:

The foregoing Executive Order consolidates surplus property functions by combining both policy and disposal responsibilities into one agency which will handle more than 90 per cent of domestic surplus disposal. Under the order, almost all foreign surplus will be handled by the State Department. [207]

The order transfers the functions of the Surplus Property Administrator to the Chairman of the War Assets Corporation, effective until March 25. Beginning on that date a War Assets Administration will administer both the present surplus property disposal functions of WAC and the former functions of the Surplus Property Administration. Lieutenant-General E. B. Gregory, chairman of the War Assets Corporation, will be designated by the President as head of the new agency and his name will be sent to the Senate for confirmation.

Defendant's Exhibit No. 21—(Continued)

As the policy-making phase of the surplus property program has been substantially completed, there is no longer a need for a Surplus Property Administration in the Office of War Mobilization and Reconversion. W. Stuart Symington, Administrator, who urged the merger of functions, has been nominated as Assistant Secretary of War for Air, and resigned his SPA post as of February 1.

The order will have the effect of streamlining the organization of surplus property activities, by placing under single direction the functions of making and carrying out domestic surplus property policies. Until now, policies have been determined by the Surplus Property Administrator, while the bulk of disposal operations has been under the direction of the War Assets Corporation.

The President's order was issued under the First War Power Act. [208]

The President has directed the Board of Directors of the Reconstruction Finance Corporation to take necessary steps as soon after March 25 as practicable to dissolve the War Assets Corporation which was originally created as the Petroleum Reserves Corporation under the Reconstruction Finance Corporation Act. [209]

The Court then recessed until 3:30 o'clock p.m., at which time the parties and counsel were present.

The Court: Gentlemen, what have you done about the exhibits?

Mr. McKevitt: Your Honor, two of these exhibits are Federal Executive Orders, and two were

not in the Federal Registry which the Court would take judicial notice of. I think it is easier than to have to find it.

Mr. Maury: We have our same objection to offer No. 8.

Mr. Maury: We make our same objection to offer No. 9.

Mr. Maury: We make our same objection to offer No. 10.

Mr. Maury: We make our same objection to offer No. 11.

Mr. Maury: No objection to offer No. 12, except that it is admitted in the answer and alleged in the complaint. It is repetition.

Mr. Maury: Same objection to offer No. 13.

Mr. Maury: No. 14 is photostatic copies of six letters, none of which are to the merits, and we object for the same reason as our original objection to No. 7, and also that they are hearsay and not binding.

Mr. Maury: Our objection to No. 15 is it tends to [210] encumber the record and for the reason it is contained in the complaint and admitted in the answer.

Mr. Maury: Same objection to No. 16.

Mr. McKevitt: You agreed to putting executive orders in.

Mr. Maury: But it has no relevancy. I do not mean it shouldn't be called to the attention of the Court by some writing instead of asking us or the Court to look it up.

Mr. Maury: Same objection to each of the three documents in No. 17, telegram, letter and telegram.

Mr. Lamb: The next two exhibits may be withdrawn and not offered; they have previously been offered in a prior exhibit.

Mr. Maury: Which exhibits—18 and 19?

Mr. Lamb: Nos. 18 and 19.

Mr. Maury: We want to get the date on this one and we can't without untying something here.

Mr. McKevitt: The date appears here.

Mr. Colton: April 14, 1945.

Mr. Maury: We object to No. 20 for the reason it is not shown to refer to any of the property in the lease. If it is, we can't find it. We can't find any reference.

Mr. McKevitt: This is declaration of surplus, your Honor, of this plant or property. They use the word "Plancor" and this particular Plancor is described here, the mill and mine. [211]

Mr. Maury: Is that the mill?

Mr. McKevitt: This is Mouat.

Mr. Maury: Is it down at the mill or property embraced in the lease?

Mr. McKevitt: This as far as declaring surplus would be at the mill and the rest of it.

Mr. Maury: It doesn't say so.

Mr. McKevitt: To me it is the entire operation.

Mr. Maury: We insist upon our objection; it doesn't refer to this property in any way.

Mr. McKevitt: Your Honor, it specifically describes the millsite, and specifically 55-three-room

dwelling, 40-four-room dwellings, 55-two-room duplex dwellings, 8 forty-two men bunk houses, which are the very things we are arguing about. Complete mining equipment. This is the surplus of this plant.

Mr. Maury: I don't think so. I think that is down at the mill.

The Court: That is on the lease?

Mr. McKevitt: Yes.

Mr. Lamb: Your Honor, it has an identifying number and if they insist upon it, we can tie that one in to show this is the identical property considered.

The Court: Is that all your exhibits at the present at any rate? [212]

Mr. McKevitt: This is another Executive Order that set up the War Assets.

Mr. Maury: This is an Executive Order that we know all about.

The Court: Of course, counsel for the defense claim on their part that this has some application to the lease or material bearing on the issues involved here. That is their claim. You object to it and say they haven't, except in respect to those exhibits you have already admitted that you have no objection to, so that without stopping now to go all through those exhibits, we will receive them subject to your objection.

Mr. Maury: Subject to our general objection to No. 7.

The Court: And then when you have more leisure after the case is over and preparing your briefs or statement of facts, we will consider them.

Mr. McKevitt: That is what I had in mind. These are my basis——

Mr. Maury: I always felt we couldn't agree to that but it is the best way to do it.

The Court: It is the best way to do it at this time because the Court isn't familiar with all these questions at this time and having gone through the complaint and answer and lease to make a definite ruling, and I, of course, don't propose to do it so we will let the matter stand that way and you [213] can proceed.

Mr. Maury: Of course, we have an exception or we take exception to each one.

The Court: Yes.

Mr. McKevitt: We have one more. I don't have a certified copy and the man who is in charge is here.

Mr. Maury: Let's see it.

Mr. McKevitt: This is a letter from War Assets Administration taking over responsibility of property from Reconstruction Finance Corporation as of September 1. Defendant's Exhibit No. 22.

Mr. Maury: This is objected to for the reason that under the law of Montana anyone acting in collusion with a tenant does not relieve the tenant from obligations under the lease. This instrument on its face shows that it was a perfectly voluntary instrument by the Reconstruction Finance Corpora-

tion and the War Assets Administration. It is the date of 27th day of August, 1946, or six months almost after Mouat was entitled to his, the Mouats were entitled to their property, and also that Reconstruction Finance Corporation had no power to dispose of any of this property. It was the property of the plaintiffs on the 1st day of March, five months and 29 days before the execution of this instrument.

Mr McKevitt: Your Honor, I am introducing that instrument to show a fact what the official records show; [214] that War Assets took over this particular piece of property from Reconstruction Finance Corporation. I think most of the objections Mr. Maury makes go perhaps to basic legal objections to the whole thing but that instrument is for that one purpose.

The Court: I will make the same ruling.

Mr. Maury: We except, your Honor.

Whereupon said Defendant's Exhibit No. 22, being letter dated Helena, Montana, August 31, 1946, from War Assets Administration, by Eugene H. Mahoney, Chief, Sub-Office, Real Property Disposal, to Reconstruction Finance Corporation, Helena, Montana, and attached Memorandum of Understanding dated August 27, 1946, offered and received in evidence, is a part of this record, and is in words and figures as follows, to-wit: [215]

DEFENDANT'S EXHIBIT NO. 22

War Assets Administration

Helena, Montana

August 31, 1946.

Reconstruction Finance Corporation

Helena Loan Agency

Power Block

Helena, Montana

Gentlemen:

The United States of America, acting by and through the War Assets Administrator hereby accepts the custody, protection and maintenance of Plancor 587, Columbus, Montana, as of the close of business this day.

Responsibility is hereby accepted for all real and personal property located on or belonging to Plancor 587.

Accountability for the property on Plancor 587 is conditionally accepted subject to reinventory by the War Assets Administration as set forth in paragraph two of Memorandum of Understanding by and between the Reconstruction Finance Corporation-Office of Defense Plants and the War Assets Administration dated August 27, 1946, a copy of which is attached hereto and made a part hereof.

UNITED STATES OF
AMERICA

By WAR ASSETS

ADMINISTRATOR

By /s/ EUGENE H. MAHONEY

Chief, Sub-Office, Real

Property Disposal. [216]

Defendant's Exhibit No. 22—(Continued)

Memorandum Of Understanding

This Memorandum of Understanding, entered into this 27th day of August, 1946, by and between the Reconstruction Finance Corporation-Office of Defense Plants and the War Assets Administration shall govern the procedure to be followed in transferring Plancor 587 and Plancor 133 to the War Assets Administration and define the duties, responsibility and accountability of each of the aforementioned, corporation, office and administration as hereinafter set forth in detail.

I. The War Assets Administration will assume responsibility and accountability for the protection, maintenance and plant clearance of Plancor 587 and Plancor 133 as of the close of business August 31, 1946.

II. The War Assets Administration will accept, in lieu of SPB 1's, the Asset Property Records and inventories for all property not previously declared on SPB-1 on Plancor 587 and Plancor 133. It is recognized that these records are not complete or in perfect condition due to the shortness of time for delivery to War Assets Administration. Accountability will be accepted on the basis of a reinventory by War Assets Administration personnel. Should any discrepancy arise between the Asset Property Records and inventories and the physical inventory as made by War Assets Administration, the Reconstruction Finance Corpora-

Defendant's Exhibit No. 22—(Continued)

tion-Office of Defense Plants agree to correct the Asset Property Records and inventories to conform with the [217] inventory as made by War Assets Administration.

III. The Reconstruction Finance Corporation-Office of Defense Plants will provide War Assets Administration with the original, certified or photostatic copies of all leases, deeds, abstracts, agreements, easements, rights of way, condemnation proceedings or any other legal encumbrance on or pertaining to Plancor 587 and Plancor 133. It is further agreed that copies of all available blueprints, plats and maps pertaining to the aforementioned Plancors will be furnished War Assets Administration.

IV. The Reconstruction Finance Corporation-Office of Defense Plants will assign to War Assets Administration, all leases, contracts and agreements affecting the continued operations on Plancor 587 and Plancor 133.

V. The War Assets Administration will employ such personnel not required by Reconstruction Finance Corporation-Office of Defense Plants and necessary to the continued operation of said Plancors.

In the event that clearance of funds is not received from the Washington, D.C. office of War Assets Administration, in sufficient time to meet the first payroll after takeover, the Reconstruction Finance Corporation-Office of Defense Plants will pay same upon receipt of proper authorization from

Defendant's Exhibit No. 22—(Continued)
the War Assets Administration, Helena, Montana,
Regional Office.

VI. It is further agreed that Reconstruction Finance [218] Corporation-Office of Defense Plants will request their Washington, D.C. office to transfer all automobiles, except one, now used on Plancor 587 and Plancor 133 to the War Assets Administration.

VII. The War Assets Administration will lease the office space used by Reconstruction Finance Corporation-Office of Defense Plants in Columbus, Montana and furnish Office of Defense Plants sufficient space and office equipment to terminate their operations.

The War Assets Administration will be reimbursed by Reconstruction Finance Corporation-Office of Defense Plants for office space and utilities on a pro rata basis to be later agreed upon.

RECONSTRUCTION
FINANCE CORPORATION

By
Title

OFFICE OF
DEFENSE PLANTS

By
Title

WAR ASSETS
ADMINISTRATION

By
Title

Mr. McKevitt: We offer this map. Defendant's Exhibit No. 23.

The Court: The lines are not very distinct.

Mr. Maury: Ours is an exact replica of it except the property is outlined in colors. It is an exact replica of the map we have got.

Mr. McKevitt: We can use the same map, but there is just one thing this map shows, your Honor, the other map doesn't, and that is the location of the area in the condemnation suit with respect to the rest of the property. In other words, their map is the same as this but down here around the mill-site that line is in the condemnation suit.

Mr. Lamb: For the purposes of the record we will mark the line to which Mr. McKevitt just referred with an "X", and it contains the words adjacent thereto of "Condemned Area".

Mr. McKevitt: I offer that map as Defendant's Exhibit No. 23.

Mr. Maury: We have no objection except it is a replica of ours.

The Court: Very well, it may be received.

(Whereupon said Defendant's Exhibit No. 23, being a map, offered and received in evidence, is a part of this record.) [220]

Mr. McKevitt: I think that covers our documentary evidence, your Honor. Call Mr. Norton.

JOHN EDWARD NORTON

was called as a witness for defendant, and having been first duly sworn, testified as follows:

(Testimony of John Edward Norton.)

Direct Examination

By Mr. McKevitt:

Q. Your name, please.

A. John Edward Norton.

Q. Where do you live, Mr. Norton?

A. New York City.

Q. For whom do you work now?

A. Anaconda Copper Mining Company.

Q. What school are you a graduate of?

A. School of Mines of the University of Montana, and School of Mines of Columbia University, New York.

Mr. Maury: Mr. Norton's qualifications as a Mining Engineer, Civil Engineer, and Metallurgical Engineer are admitted.

Q. (By Mr. McKevitt): Mr. Norton, for whom were you working in the year 1941?

A. For the Reconstruction Finance Corporation.

Q. Were you at any time employed by the Metals Reserve?

A. At that time I was doing work for both Reconstruction [221] Finance Corporation and Metals Reserve; later on I went entirely to Metals Reserve.

Q. In December of 1941 whom were you working for primarily?

A. Reconstruction Finance Corporation.

Q. Doing Metals Reserve work too?

A. Doing Metals Reserve work.

Q. As part of your duties in your capacity for

(Testimony of John Edward Norton.)

Reconstruction Finance Corporation and Metals Reserve did you proceed to Billings, Montana, to negotiate a lease for construction of mining property? A. Yes, I did.

Q. With whom did you negotiate?

Mr. Maury: We object. It is not material. The lease was finally negotiated and finally admitted to be the genuine lease and any prior negotiation is not relevant in this case.

Mr. McKevitt: Your Honor, I suppose I might as well explain now, in other words, in this lease as finally drawn there is certain language which or would have the necessity for quit claiming certain land for townsite, and another clause which refers to what should be left on the premises on termination of the lease, and it becomes very important, and the two are somewhat ambiguous to express what the parties that entered into the lease what those terms meant to them. [222]

The Court: That is altering the terms of a written agreement, isn't it?

Mr. McKevitt: Your Honor, I believe that the rule—well, it is not altering terms of the written instrument. It is not my intention to alter the instrument. We have here a lease admitted and part of the complaint in which as pertinent factors develop in this lawsuit are two of those clauses upon which a lot of the controversy has developed here. In other words, whether or not under this clause which states that wooden buildings and

(Testimony of John Edward Norton.)

wooden mine structures shall be left on the premises it was the intention that the parties at the time had a very definite meaning for wooden buildings and structures, and not to vary the terms but what was intended at the time the lease was terminated is the very crux of the matter now. I believe I could argue it on the terms of the lease as well but in view of the fact there may be latent ambiguity—I believe Tiffany in writing on the very rule we are discussing says it is a rule of great value to see that they were so charged that people once they write it cannot change it, but the contention of the defense here is not to explain when there is ambiguity that becomes of importance.

The Court: There can be no ambiguity of a wooden building. No man can testify something that is a wooden building is meant not to be a wooden building, any more than [223] a man can say a rocking chair is not a rocking chair.

Mr. McKevitt: I submit, your Honor, the term wooden buildings is so broad it covers everything. In particular terms you need some evidence to know what the people were thinking about, particularly where it was contemplating a lot of buildings, wooden buildings, entire mine and mill facilities, and the type buildings ordinarily around a mine, but in addition the parties knew there were town-sites to be built in different places, and it is very important, therefore, for this Court, I believe, to

(Testimony of John Edward Norton.)

get an idea what the parties at the time knew about that term wooden buildings.

The Court: Then you mean how many wooden buildings. You limit that term by saying so many wooden buildings some place.

Mr. McKevitt: Your Honor, distinguishing wooden buildings around the mine and the wooden buildings the men used here down at the townsite. That is really one of the disputes in this case. It is our contention wooden buildings is meant wooden buildings at the mine, and the townsite was to be built elsewhere, and does not include wooden buildings in this lease. In other words, we would just be arguing it back and forth on the bare statement of the lease and it leaves you all up in the air on the broad term of a wooden building complete. [224]

Mr. Shone: We have certain rules of construction by our statute that the terms of this lease will be construed and given the general meaning intended. Now counsel is attempting to restrict the terms of this lease to vary the lease by oral testimony and counsel in this case has not pleaded in their defense any mistake or ambiguity of the written instrument, nor have they ever attacked the validity of the lease in question; in fact, to the contrary, they have admitted this lease as being the contract. Now as I view it the Court will follow the Montana statutes in the construction to be given the words used in this lease, and not what some particular witness might state the terms should

(Testimony of John Edward Norton.)

be or that the terms should be less than the terms used, or that wooden buildings did not mean certain buildings. The Court will I think not elect at this time to restrict those meanings but will give to those terms the application they deserve.

The Court: What do the pleadings say about it? Is there ambiguity?

Mr. McKevitt: There is no pleadings on it. They don't plead mistake. They don't plead ambiguity or ambiguity of the lease in any way. The lease we admit as written is attached to the complaint, a copy of it.

I am not saying there is mistake. It is not a matter of pleading. I am not saying this instrument was mistake. It was the way certain men drew it. It is [225] the way they wanted it drawn. It is an important question of the historical developments. I am not varying and I am not changing it. I am simply explaining at this point what is important ambiguity at this point.

Mr. Lamb: If the Court please, we are dealing here with mining operations and the term wooden building used in the customary mining lease, the usual type of lease operated, and the contention of the Government is the wooden structures ordinarily found in a mining operation. However, in this particular matter we are also involved with a city, a townsite which was constructed, and those facts were known. And the purpose of this particular type of testimony is to show that that section was

(Testimony of John Edward Norton.)

understood by the parties when they specified in the lease that they would be given deeds for town-sites and millsites, and it was understood at the time that the words "wooden buildings" was put in there that they only meant the ordinary common wooden structures that are found at the usual mine operations.

The Court: Why didn't they put it in the lease while they were about it?

Mr. Maury: They did, your Honor. They put it in here just what you said, all wooden mine structures and wooden buildings erected should remain on the property intact. They used both terms, took in both wooden mine structures and wooden buildings. [226]

Mr. Lamb: As the Court knows, up around the usual mine sites it is found we have, or there are always a few miner's shacks and ordinary buildings, but at no time in this country have we ever found a city constructed up on top of a mountain for the specific purpose of permitting operations at a mine, and if the Court will refer to the exhibit that is there, it will show the mine structures and wooden buildings are located at the mine site and not at the townsite.

Mr. Shone: Now, may it please the Court, I want to read the latter part of paragraph 15 of the lease to show the Court what they could take off and what they should leave:

(Testimony of John Edward Norton.)

“Upon the expiration of this Lease or the termination of this Lease for any reason by either party, Lessee shall have six (6) months additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways,

Mr. Shone: That is the limit.

“but shall leave intact all mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises and ore on dumps upon which royalties have not been paid.”

Mr. Shone: Now as the Court will notice in the construction of this lease that here the lessee who drew the [227] contract has stated what it shall take off and it does not include in it that it shall remove wooden buildings or wooden structures. It merely says:

“its personal property and its tools, equipment, machinery, tracks and tramways,”

Mr. Shone: And specifically says what shall remain on the property:

“wooden mine structures, wooden tramway towers and wooden buildings”

Mr. Shone: Now they attempt to restrict the terms of this lease by alleging wooden buildings erected upon the demised or leased premises did not include certain types of buildings. They at-

(Testimony of John Edward Norton.)

tempt to vary the terms of the written lease by oral testimony which we claim cannot be done.

Mr. Lamb: We are not varying the terms.

Mr. Shone: Varying or restricting the terms.

The Court: Well I suppose we might continue this dispute indefinitely. I will permit counsel to show what they intend to prove here and then whether it will be accepted and considered is another question, but we will see whether there is any justification for what they propose to do and the only way we can find out is to let them go ahead and state what they propose to do.

Mr. Maury: And we note our exception. [228]

The Court: Then we can see whether they can justify it or not later on.

Mr. Maury: You note our exception?

The Court: Certainly.

Direct Examination—(Continued)

By Mr. McKevitt:

Q. I believe you said that in December, 1941, you proceeded to the area of Billings, Montana, and negotiated for a lease? A. Yes.

Q. With whom did you conduct those negotiations? A. Mr. William Mouat, Bill Mouat.

Q. That is the plaintiff in this case?

A. Yes.

Q. Did you have any negotiations with Mrs. Mouat?

A. Yes, Mrs Mouat took part.

Q. At the time you were negotiating with re-

(Testimony of John Edward Norton.)

spect to the lease was there any discussion of the meaning of the language in paragraph 15, which is as follows, and I am now reading from the lease which is an exhibit to this case? [229]

“Upon the expiration of this Lease or the termination of this Lease for any reason by either party, Lessee shall have six (6) months additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises and ore on dumps upon which royalties have not been paid.”

Mr. Maury: Well, same objection.

The Court: Same ruling.

Mr. Maury: We will except.

A. Yes, there was a discussion about that.

Q. Was the discussion about what the meaning of wooden buildings would be?

A. Yes, that whole paragraph was carefully discussed. I came out here the first time, the date you said, in June, 1941, for the purpose of getting the lease from Bill Mouat. Of course, at that time we discussed it and Bill agreed to give a lease.

Mr. Shone: To which we object of any discussions of a lease in June of 1941. Now we are dealing with a lease [230] of December 20th, 1941.

Mr. Maury: That is another lease entirely.

(Testimony of John Edward Norton.)

Mr. McKevitt: I think if you let the witness proceed——

The Court: I suppose this is preliminary to this present lease now under consideration?

Mr. McKevitt: That is right.

The Court: Go ahead.

A. Bill agreed to a lease similar to the one that the other chrome property——

Mr. Maury: We object to that lease unless it is introduced, unless it is right here.

The Court: I suppose he agreed he would execute a lease similar to this present lease.

A. (Witness): Well, there were no maps of these mining claims available that you could tell just where they were or what they were and I went over the property with Bill Mouat. I was here for a period I guess all-told of seven or eight days, and there were no maps to the property that I could definitely say what mining claims we wanted or what, so an abstractor was hired and he went to the courthouse——

Mr. Maury: We object as this is not material to this issue. He is rambling off. What the abstractor was hired for.

The Court: What are you coming to in all your preliminary steps? [231]

Mr. McKevitt: Would you get to it?

A. (Witness): All right. We discussed this proposition and we did it referring to the proposition of the construction work right at the mine-

(Testimony of John Edward Norton.)

sites, and that there would have to be townsites built, and there were townsites being built at the other property, and there were townsites to be built at this property and that is the reason we wanted 200 acres of land deeded to us because the Government wanted title to all of the land on which they put the townsites and millsites.

Q. (By Mr. McKevitt): Did you have any particular discussion in connection with what land would be for townsites?

The Court: Well I expect the witness knows now about what is expected of him after this discussion. Mr. Norton, do you?

Q. (By Mr. McKevitt): Did you have any particular discussion with respect to the meaning of the term wooden buildings as set out in the lease?

A. In paragraph 15 we had discussions, quite a few of them that that paragraph meant structures erected at the mine sites. By mine sites we meant sites where you went in the ore body and opened up to develop the ore body.

Q. In other words, was there anything in that discussion which would indicate that that term wooden buildings would [232] mean houses to be built at the townsite?

Mr. Maury: We object; that is not material. Was there anything indicated that it would not be might be material.

A. (Witness): That paragraph is all written on our discussion of the erection of what was needed

(Testimony of John Edward Norton.)

at the mine sites, the tram sites or shaft sites, whatever we would need to open up and mine that ore.

Q. And at the same time this other provision was put in the lease for creating fee land for construction of the mill sites and town sites?

A. Mill sites and townsites there was a paragraph there the Mouat people would deed 200 acres of land.

Q. Mr. Norton, are you generally acquainted with the production of chrome ore in the United States today?

A. Well I would say generally we are not a very big producer of chrome.

Q. Do you know of your own knowledge where the production of chrome comes from in the world today?

Mr. Maury: We object as it is not material to this issue. We will be a long ways from home.

The Court: I suppose he is leading up to execution for terminating the lease.

Mr. McKevitt: This is a different point, Your Honor.

The Court: All right, what is it?

Mr. McKevitt: I simply want to bring out the [233] commercial value of this mine.

Mr. Maury: Whatever the value is we are entitled to it.

Mr. McKevitt: It is important, Your Honor. On one of the issues, for instance, they are demanding a certain amount of money for lack of possession,

(Testimony of John Edward Norton.)

and I simply want the court to know whether this is a mine where possession would be of tremendous importance or whether it wouldn't.

The Court: Go ahead and develop your theory along that line.

Q. (By Mr. McKevitt): Do you know whether there is any chrome production commercially in this country today?

A. Oh, there is very little if any production in this country today. Very little.

Q. And what is the reason?

A. Well we don't have the chrome ore bodies that meet the specifications of the buyers.

Q. You mean by specifications the amount of percentage of chrome?

A. Yes, there are different specifications for the high grade chrome. The steel people have specifications. The chemical users have specifications, and so do the refractory users of chrome.

Q. Do you know what the percentage of chrome produced [234] from this mine was?

A. Well the concentrate that was produced from this mine ran 40, 41 per cent chrome and its chrome iron ratio, the ratio of chrome iron was very low. The concentrate out here ran about 1.6 to 1 and for metallurgical chrome the users practically demand $2\frac{1}{2}$ to 1 or better.

Q. By concentrates you mean the material produced after running through the mill?

A. After running through the mill.

(Testimony of John Edward Norton.)

Mr. McKevitt: That is all.

Cross-Examination

By Mr. Maury:

Q. Mr. Norton, were you present when this lease was being drawn? A. Yes, I was.

Q. Was Mouat present? A. Yes.

Q. Who was drawing the lease?

A. Oh, there was Mr. Mouat and there was Mr. A. S. Hutchinson of Washington, D. C.

Q. Is he here now?

A. Yes, he is here. [235]

Q. Yes.

A. And there was Fred Gaethke was there for a while, and Judge Dwyer was there.

Q. Judge John V. Dwyer of Butte?

A. Judge John V. Dwyer.

Q. Where was that?

A. Why we worked in the Grand Hotel.

Q. And one night?

A. And we worked a night in the office over here at the Montana Power Company.

Q. Yes, sir. How long was it in process of being written and talked over and considered?

A. Oh, I couldn't say exactly, three or four days.

Q. And during that time there were consultations with Mr. Mouat?

A. Yes, and Mr. Mouat held consultations with his lawyers, the Honorable Judge Goddard and Henry L. Myers here.

Q. Yes.

(Testimony of John Edward Norton.)

A. And this other witness' father who was here today.

Q. Mr. Link? A. Mr. Link.

Q. Yes. You have never been admitted to the Bar? You weren't drawing the lease?

A. No, no, I wasn't.

Q. The lease in its final form was drawn by Mr. Hutchinson [236] and Judge John V. Dwyer, wasn't it?

A. No, I would say Mr. Hutchinson, and Mr. Mouat was there, and Mr. Dwyer sat in mostly as he took very little if any part in the drawing; he was present.

Q. Yes. Who dictated the lease?

A. Why it was all written up together. It was not dictated. You mean by dictating to a stenographer?

Q. The final form?

A. It was pretty well written out in longhand and then given to the stenographer, and Mr. Hutchinson did the greater part of the work.

Q. Yes, and now tell us just what conversation took place about paragraph 15, and who said what?

A. Well, paragraph 15 when we talked about it we said that that pertained entirely to the structures at the different points of the developing of the ore bodies.

Q. And you told that in the presence of Judge Dwyer and Mr. Hutchinson? A. Yes.

Q. Yes, and before the lease was drawn or before it was finally signed?

(Testimony of John Edward Norton.)

A. Oh, yes. Yes, it was. That was in, the same paragraph was in the original lease.

Q. The original lease was drawn in June of 1941?

A. Yes, June of 1941. [237]

Q. And do you know where that is?

A. No, I don't know where it is. Mouat had his copy of it and it was drawn to his terms. He had seen the lease of the Benbow people and he asked for a similar lease, and we did the best in our power to give him a similar lease to the Benbow.

Q. Now on the day or two or three days that the lease was being drawn and one evening when it was assuming final form who was present and where were you all?

A. We were in the Grand Hotel for several days.

Q. Yes.

A. And Mr. Hutchinson was present. There was a Government lawyer named Moses that was out here, and there was Judge Dwyer, and I believe a man named Buck that was a friend of Mr. Mouat's, I believe he was there most of the time, and Fred Gaethke of the Anaconda Copper Mining Company. That is about all I remember.

Q. And that was while the draft was being made?

A. Yes.

Q. And you were discussing things with the lawyers and they were asking you questions?

A. Yes, I was there to give the engineering advice on the——

(Testimony of John Edward Norton.)

Q. Now was that everyone who was there except Mr. Link?

A. As far as I remember that is everyone that was there. [238]

Q. You can't recall any person else that was there during all of that discussion unless it were some stenographer and typist?

A. Well the final night there was a stenographer but I don't remember anybody else being there. It has slipped my mind if there was anybody else there.

Q. And now can you tell us when the lease happened to be written that there should be wooden mine structures and also wooden buildings did the two mean the same thing to your mind?

A. No, they didn't. Wooden mine structures meant ore dams and trestles and tramways——

Q. And loading platforms?

A. Loading platforms, and wooden buildings meant the buildings that would house hoisting engines, any dries, machine shops or things like that.

Q. Now can you tell us why in one place they use the words wooden mine structures and in the other they just use the words "wooden buildings"?

A. Well the structures referred to the trestles, loading platforms and things of that kind.

Q. But I am asking you why the word "mine" was left out in one phrase and the word "mine" was put in wooden mine structures? Can you tell us why that was done?

A. All we thought on was how to show it all re-

(Testimony of John Edward Norton.)

ferred to the same thing because we contemplated all the time to [239] build the townsites on the land that was deeded by Mr. Mouat to the Government.

Q. Now deeded, that land was not in the lease but down close to the mill, was it not?

A. That was one site down close to the mill. There was a millsite and there would be a mill townsite, and we all knew that there would have to be a townsite up near the mine.

Q. I see. And yet in spite of all of that knowledge at that time the lease came out in its present form?

A. Yes, it was our idea that this 200 acres of land was deeded and that that would not be on any land covered by the lease, and that this paragraph here that Mr. Mouat would get all the buildings, wooden buildings and structures erected around the mine entrances.

Q. Now just what exactly did you tell Mrs. May Paula Mouat?

A. Oh, Mrs. May Paula Mouat I don't remember that we told her very much.

Mr. Maury: That is all.

Mr. McKevitt: That is all.

Mr. McKevitt: Just one more question, Mr. Norton.

Redirect Examination

By Mr. McKevitt: [240]

Q. Can you say of your own knowledge whether this mine has any commercial possibilities today?

A. Oh, it would be my opinion and only my opin-

(Testimony of John Edward Norton.)

ion that right at the present time that the mine could not be operated at a profit.

Q. And that situation has continued since the end of the war? A. Yes, I think so.

Mr. McKevitt: That is all.

Mr. Maury: That is all.

HUGH G. NICELY

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lennon:

Q. State your full name.

A. Hugh G. Nicely.

Q. Where do you live?

A. At the moment I am living at the Mouat mill-site camp.

Q. By whom are you employed?

A. War Assets Administration.

Q. In what capacity?

A. Facilities Supervisor. [241]

Q. And what is your training, professional training?

A. Graduate from the School of Mines, Montana, in 1935.

Q. And have you practiced your profession since that time? A. More or less.

Q. And when did you first come on to the Mouat mine property? A. April, 1942.

(Testimony of Hugh G. Nicely.)

Q. And you were in the employ of whom?

A. Anaconda Copper Mining Company.

Q. And at one time you were employed in the construction or mining operations?

A. That is right.

Q. And when was that?

A. When I went over there in 1942. That is when I was there as mine foreman.

Q. And did you continue your employment at that mine up to the present time?

A. That is right but not under Anaconda Copper Mining Company.

Q. When did you first go in the employ of the copper company?

A. January, 1944, Reconstruction Finance Corporation.

Q. And you continued in the employ of them up until War Assets took over? [242]

A. September 1, 1946.

Q. And you and your family live up at the mine at the townsite at the present time?

A. Correct.

Q. I am referring to the Plaintiff's Exhibit 2, the map, and call your attention to the houses indicated by numbers 1 through 12, inclusive, on the east side of the townsite; are you familiar with the present condition of those houses? A. Yes.

Q. And will you state what the condition of those are generally with reference to the condition of other houses in the whole area?

(Testimony of Hugh G. Nicely.)

A. The wallboard has been taken out and some of the electrical fixtures have been disconnected and the plumbing has been removed.

Q. Would it be a correct statement to say those houses are stripped entirely except for walls, ceiling and roof? Is that a pretty fair statement?

A. That is right.

Q. Is the plumbing and the plumbing pipe, electric fixtures and electric wires, and inside panels removed? A. That is right.

Q. Now with reference to the houses that were formerly located at places marked 13, 14, 15 and then 19 through 34 on this same map, I think it is Exhibit 2, those houses were [243] those houses removed from their piers? A. Yes.

Q. When was it with relation to the date of August 31st, 1946, before or after?

A. Shortly before; during the last week of August.

Q. When was the removal of those houses started with reference to August, 1946, before or after?

A. Before.

Q. And when were they completed?

A. I don't remember when it was. It was a month later at least that the work was stopped.

Q. How many had they taken off prior to August 1st, 1946? A. One.

Q. And the balance of the 21 were removed after that date I presume? A. That is right.

Q. And what was the type of house as compared to the type still remaining, standing? Will you

(Testimony of Hugh G. Nicely.)

point out one still remaining standing similar to the ones removed?

A. Right across the street here.

Q. Well call it by number. I will point to, for instance, house No. 22, that was removed, right?

A. That is right.

Q. Now will you give me the number of another house that has remained intact on the site at the present time? [244]

A. Here is one right here.

Q. Well, one that hasn't been stripped up in the west part; I believe anyone of these 49 through 50?

A. 50 E.

Q. Now are you familiar with the present condition of the houses that remain standing?

A. Fairly well.

Q. Excluding the 11 that I have already referred to, will you state—can you state whether or not anything other than fixtures, plumbing fixtures and electrical fixtures have been removed?

A. That is all. To my knowledge that is all that has been removed.

Q. You are testifying from your own knowledge?

A. That is right.

Q. You are there every day and have occasion from time to time to see these houses, correct?

A. That is right.

Q. So the houses other than the 11 that still remain on there you will state that the plumbing fixtures have been removed? Is that right?

(Testimony of Hugh G. Nicely.)

A. Have been removed.

Q. And do you know whether or not at any time there were any oil heating units in any of the dwelling houses in the area? [245]

A. Each house was furnished with an oil heater.

Q. Oil heater? A. Kitchen range.

Q. Now was it an oil heater or was it a cook stove? A. Primarily cook stove.

Q. What do you mean primarily?

A. It was used for both purposes.

Q. Well if it was out in the store and you went to buy it, what would you ask for?

A. Cook stove.

Q. And it was connected I presume to the tank outside?

A. That is right, with copper pipe.

Q. Going through the wall?

A. That is right.

Q. And it was a cook stove which was used for cooking the food and heating the house, is that right? A. Yes.

Q. And all of those were removed, is that correct? A. Correct.

Q. Was any of the—I am not referring to plumbing fixtures—but was any of the pipe plumbing itself or electric wiring removed from any of the houses other than those removed in the 11 I talked about before?

A. You say pipes and electric wire?

Q. Was any of that removed? [246]

(Testimony of Hugh G. Nicely.)

A. Not deliberately by men who worked for the Government.

Q. Did the Government remove any?

A. Definitely not.

Q. Would your answer be the same with reference to the mess hall? A. Right.

Q. And to the 4 forty-two man houses.

A. Right.

Q. And to the store? A. That is right.

Q. Now going up to house No. 35, is that the first-aid house? A. That is right.

Q. House No. 35 is what is known as the first-aid house? A. That is right.

Q. What is the condition that house is in now with reference to the other houses remaining standing?

A. The plumbing and some of the interior sections has been stripped out of it.

Q. So house 35 would be in the category of the 11 houses away over on the east side? Is that a correct statement? A. Correct.

Q. When with relation to August 31st, 1946, did the Government remove those plumbing fixtures?

A. Prior to that date. [247]

Q. How long ago? A. How long before?

Q. Yes.

A. We worked up shortly until the end of the month.

Q. Of that month, August, 1946? A. Yes.

Q. Did they remain up at the mine?

(Testimony of Hugh G. Nicely.)

A. Some were at the mine site and some stored in several of the other buildings off the lease.

Q. But they were not taken away from the mine prior to August 31, 1946? Is that correct?

A. No.

Q. Were you requested to make a list of the fixtures that had been removed from all the houses remaining standing in the leased area, you together with other employees?

A. That is right. Not as to each building but just general inventory as to the number.

Q. And then that list is made to exclude what was in the houses removed?

A. That is right.

Q. I show you what purports to be a list of townsite portion of Mouat lease of fixtures and quantities. Was that list made pursuant to your conference with other members of the Government in making a list of what was removed at my request as a matter of fact? [248]

A. Yes.

Q. And it is broken up into ten different categories showing the different types of houses from which the fixtures were removed, is that right?

A. Yes, that is right.

Q. And this is from your knowledge a list of everything that has been removed from the townsite area from the various dwellings and houses and the individual buildings, including the store, bunk houses and the mess hall?

A. That is right.

Mr. Maury: This purports to be only 10 of the houses.

(Testimony of Hugh G. Nicely.)

Q. (By Mr. Lennon): Will you explain how that list is broken up? What is the first item. There are 10 items. A. Three room, 25x24.

Q. The first item is with reference to what was removed from the three room houses?

A. That is right.

Q. And is this with reference to the 22 three room houses that were removed from the premises?

A. That is right.

Q. And is this toilets, lavatories, kitchen sinks, water tanks, showers and mirrors?

A. That is right. [249]

Q. Now is that all that was removed from the three room houses referring to the 22 that are removed? A. That is right.

Q. Let's proceed to the next item. The second item is with reference to the 11 houses on the east side, correct? A. Yes.

Q. And what was removed from each of those?

A. What was removed from each of those, toilets, lavatories, kitchen sinks, water tanks, showers, mirrors, 11 each.

Q. The third item refers to the four room houses that are still intact over further to the west of the houses removed, right? A. That is right.

Q. And there were how many of those houses?

A. 40.

Q. And will you tell the court the items that were removed from those 40 houses?

A. 40 each bathtubs, lavatories, toilets, kitchen sinks, medicine chests, water tanks.

(Testimony of Hugh G. Nicely.)

Q. Now the next item is the duplex houses?

A. Yes.

Q. And how many of those houses remaining standing? A. 40.

Q. And will you state what has been removed from those houses? [250]

A. 40 each toilets, lavatories, showers, medicine chests, water tanks, sinks, kitchen.

Q. Now the four bunk houses, Item No. 5, what does that indicate has been removed?

A. 16 toilets, 8 urinals, 32 lavatories, 8 laundry tubs, 102 radiators, 8 drinking fountains.

Q. And the mess hall?

A. Mess hall, 1 electric panel switch, toilet, lavatory, Cond. tank and electric heater.

Q. And Store building?

A. Store building, 2 lavatories, 2 toilets, and 4 steam heaters.

Q. And the first-aid house?

A. 2 lavatories, 1 bathtub, 1 medicine chest, 1 toilet, 1 kitchen sink, 4 cast iron radiators and water heater.

Q. All right, what was removed from the Post Office? A. Nothing.

Q. And the garage? A. Nothing.

Q. And that is the list of the items that have been removed from the entire townsite of the townsite? A. That is right.

Mr. Lennon: I don't think I need to offer it in evidence. [251]

(Testimony of Hugh G. Nicely.)

Q. (By Mr. Lennon): Mr. Nicely, there have been a considerable number of houses sold off that mine site, haven't there? A. Yes.

Q. And you are familiar with the general and dwelling structures and mine structures and the purposes which each one serves?

A. That is right.

Q. And are you familiar with the chromite mining? A. As it existed up there I am.

Q. Well you are a mining engineer?

A. That is right.

Q. Are you familiar with the type of chromite that was mined from the Mouat mine as compared to the type of chrome that was received from foreign sources? A. Yes.

Q. Will you state the difference between the two?

A. Well, fundamentally it is the amount of chrome in the ore, availability of the chrome and the ratio of the chrome to the iron is the difference. That is fundamentally the difference.

Q. Well would you say that the chrome that is imported is a better quality of chrome?

A. That is right.

Q. And can you say whether or not this mine has any [252] commercial value as a chromite mine at the present day having in mind the possibility now of importing chrome with better chrome content, better type and cheaper?

A. In my opinion it has no commercial value.

(Testimony of Hugh G. Nicely.)

Q. Now with reference to the accessibility to the townsite and the nickel mine of Mr. Mouat and his parties you heard the testimony this morning with reference to the two chains; was there a time when the Government did maintain two chains at two different parts of the road?

A. One chain is all I know of.

Q. Well you were there every day?

A. That is right. The chain Mr. Link mentioned was just an emergency.

Q. I don't mean that chain. Do you maintain a chain across the road at certain times during the day and lock it?

A. That is right. After hours.

Q. And what do you mean by after hours?

A. After four thirty.

Q. That chain was put up and left there from 4:30 until you opened up for business the next morning?

A. That is right.

Q. And would that chain be put up again over a week end when you are not working?

A. Any time there was nobody up around the mine site.

Q. And what was the purpose of that chain?

A. There would be people drive up to the mine site to visit people and when we had this chain out they would refrain or it would keep people from going up there.

Q. When were the guards removed from the Mouat mine?

(Testimony of Hugh G. Nicely.)

A. We haven't had any guards up there for four or five months.

Q. Will you explain please the old road as it existed prior to the construction of the Government's road?

A. You mean the main road up there?

Q. That is right, yes.

A. Well it took off right back of the mill site and wound up a little creek where we had warehouses, when first started, and from there up it was strictly a caterpillar road.

Q. And had you gone over that road prior to construction of the Government road?

A. Many times.

Q. Is there a way of entering the nickel mine—well, getting to the town site without passing the guards as they existed seven or eight months ago at the No. 1 entrance?

A. No, you couldn't get up there on that old road.

Q. You couldn't get up by automobile?

A. No.

Q. You could walk, of course?

A. You could walk, of course.

Q. Can you state whether or not the houses as they [254] remain up there now have any commercial value in place?

Mr. Maury: Objected to. He has not proven himself competent as a witness, not qualified.

The Court: I think that objection will be good.

(Testimony of Hugh G. Nicely.)

Mr. Lennon: That is all.

The Court: Court is adjourned until tomorrow morning at 10:00 o'clock. [255]

Court convened, pursuant to recess, at 10:00 a.m. on November 14, 1947, at which time parties and counsel were present.

The Court: Gentlemen, are you ready to proceed this morning?

Mr. Lamb: Yes, Your Honor.

Mr. Maury: Yes, Your Honor.

(Hugh G. Nicely resumed the stand and testified as follows.)

Cross-Examination

By Mr. Maury:

Q. Mr. Nicely, what is the Post Office to which mail is addressed by people living up at the Mouat property?

A. Most of the people get their mail at Nye.

Q. Nye? A. Nye.

Q. When did you first go to Nye to work—I mean—— A. The Mouat property?

Q. To the Mouat property?

A. I think it was April, 1942, on this job.

Q. You were working there for the Anaconda Copper Mining Company at that time?

A. That is right.

Q. How long did you continue to work for the Anaconda [256] Copper Mining Company?

A. Until January 1st, 1944.

(Testimony of Hugh G. Nicely.)

Q. And then for whom did you work?

A. Reconstruction Finance Corporation.

Q. And how long for that company?

A. Until the 1st of September last year, 1946.

Q. And at the Mouat plant? A. Yes, sir.

Q. Your duties for the Reconstruction Finance Corporation did not take you anywhere else?

A. No.

Q. Whereabouts did you and your family live?

A. In Columbus. My wife and daughter lived in Columbus.

Q. Where did you live?

A. At the Mouat Mill site.

Q. In what house? A. Guest house.

Q. Did you ever live up at the Mouat, the plateau up there where the lake is?

A. Mouat Lake Camp, yes, I did during the operation of the mine.

Q. During the operation of the mine and what house did you live in there?

A. On the map do you want to refer to it?

Q. Yes. [257]

A. House No. 36 on First Street West.

Q. Point it out, will you, which side of the line it is on? A. Right here.

Q. Right there? A. Yes.

Q. And how long have you occupied that house?

A. How long did I occupy it?

Q. Yes. A. Oh, roughly two years.

Q. When did you move out of it?

(Testimony of Hugh G. Nicely.)

A. I don't recall when it was.

Q. Was it after September 1st, 1946?

A. No, it was before that. It was roughly about the time the operation ceased.

Q. Now how many people were living up at that Camp at the Lake Placer or the Lake on September 1st, 1946?

A. Oh, I would say roughly a dozen.

Q. Had they all been employees?

A. Had been?

Q. Yes. A. Yes, they were employees.

Q. They were employees? A. Yes.

Q. One time of the Anaconda Copper Mining Company? [258]

A. Not necessarily.

Q. Yes, but they were employees connected with the mine? A. That is right.

Q. There was nobody living there except employees or except persons who might run the Post Office or store or school in connection with the mine, was there? A. That is right.

Q. In fact all of that property up there at the Lake Placer was one, was a part of one mining enterprise, was it not, Mr. Nicely? A. Correct.

Q. And there was nothing there that was not of use in running a large mining operation?

A. Right.

Q. Anything else there, anything of any other nature was voided? A. That is right.

Q. Mr. Nicely, how many persons were occupy-

(Testimony of Hugh G. Nicely.)

ing that land up there about the 1st of September, 1946, those buildings?

A. About 12 families.

Q. And about how many were there on the 1st of March, 1946? I mean occupying those houses up on the Lake Placer? A. I don't recall.

Q. I am just asking for an approximation? [259]

A. Well, say twelve.

Q. They were working people? I mean except the wives? A. Yes.

Q. The men that were there were working people? A. Yes, sir.

Q. And how many continued to occupy those buildings until the first of September approximately?

A. Oh, about the same number, I guess. I don't know. That might have been 12, might have been 15.

Q. And you were in charge?

A. That is right.

Q. Mr. Nicely, do you recall about the 1st of September a notice being placed at the gate of the lower camp in which Bill Mouat's—

A. First of September?

Q. Approximately 1st of September, 1946?

A. Yes, I believe I do.

Q. And what did that notice state?

A. Oh, I don't know the exact wording of it but it was to the effect Mr. Mouat would have to have a pass when he came in with any of his friends.

(Testimony of Hugh G. Nicely.)

Q. Now with the exception of the gate that property down there was heavily fenced?

A. There was a fence around the lower perimeter of the camp area. You are speaking of the mill? [260]

A. Yes, I am speaking of the mill and it was carefully and efficiently fenced?

A. That is right.

Q. And fences were all around or just to prevent access from the Stillwater road?

A. That was the object of the fence, yes.

Q. Through that gate was the only accessible road to the Lake Placer, wasn't it?

A. Yes, that is right.

Q. I mean accessible for vehicles?

A. Correct.

Q. And before you got to the Lake Placer—I am speaking of the period in August, 1946,—there was a gate or fence across the road?

A. Below the Lake Placer?

Q. Yes. A. Yes, there was.

Q. And can you point out on the map approximately where that gate was?

A. Roughly in here.

Q. Will you indicate the place by just writing the word "gate?" A. Yes.

Q. Was there a lock for that gate?

A. Yes, sir. [261]

Q. And was it locked at times?

(Testimony of Hugh G. Nicely.)

A. It was locked under hours. We were undermanned and didn't have the men.

Q. By under hours what would the hours be?

A. Well, we quit at 4:30.

Q. Who had the custody of that key?

A. Mr. Arthur Helseth.

Q. Mr. Arthur Helseth? A. Yes.

Q. Who was Mr. Helseth? Who employed Mr. Helseth?

A. He was shift boss under me at the mine, and then worked for Reconstruction Finance Corporation, and subsequently War Assets.

Q. He wasn't so far as you know employed by Mr. Mouat? A. No, sir.

Q. And that gate was locked at times all during the period from March 1st to September 1st, 1946, after hours? A. That is right.

Q. Mr. Nicely, was there another gate at the end of the road? A. Yes.

Q. Or chain across the road?

A. Yes, there was.

Q. And was that kept locked at times?

A. At times. [262]

Q. And what was the purpose of that chain with a lock?

A. Cars would drive up to the camp to visit people that lived up there and would be curious enough to go up to the upper camp and we had a chain with a red reflector to keep them out of there.

Q. Yes, some of the property in the lease was what you call the upper camp?

(Testimony of Hugh G. Nicely.)

A. The mine buildings.

Q. And the road wound through the camp there at Lake Placer and off to the right and then up to other properties in the lease?

A. That is right.

Q. You were well acquainted in a general way with the boundaries of the leased property?

A. That is right.

Q. You have a map showing it?

A. Yes, sir.

Q. Mr. Nicely, if Mouat or anyone under Mrs. Mouat on the 2nd of March, 1946, had attempted to remove any of the property on the Lake Placer, what would you have done, permitted it?

A. No. No, sir.

Q. And that supposing Mr. and Mrs. Mouat or Mrs. Mouat went there tomorrow and started removing property by themselves or by their servants, what would you do? [263]

Mr. Lennon: If the Court please, that is objected to on the ground that it is a general question. Removal of property; I think he should be more specific.

Mr. Maury: All right, I will be very specific.

Q. Suppose Mr. and Mrs. Mouat went there to the Lake Placer and property inside of the lease and started with the aid of servants moving one of those houses, what would you do?

Mr. Lennon: If the Court please, that is objected to for the reason it is beyond the realm of cross-

(Testimony of Hugh G. Nicely.)

examination and is no proof that they have tried to remove any of these premises.

The Court: Well, of course, it is beyond the direct examination. He can make this witness his own if he wants to and go into that matter.

Mr. Maury: All right, we will.

Q. (By Mr. Maury): What would you do?

A. You would have to prevent their removing any property.

Q. You would have to prevent it? A. Yes.

Q. And that condition has existed ever since the 28th day of August, 1946? A. Yes. [264]

Q. That had they attempted to remove any building or any plumbing or anything on the ground in the lease you would have prevented it?

A. With the proper authority I would have, yes.

Q. Now, with the proper authority you mean court authority?

A. No, I mean in form of document or sales document or whatever is required to get something.

Q. Without their getting authority, just on their own authority they couldn't remove anything from there while you were there? A. Correct.

Q. Mr. Nicely, are you a member of the Nye Wrecking Company?

A. Yes, sir, I am the business manager for it.

Q. Business manager for the Nye Wrecking Company? A. Yes, sir.

(Testimony of Hugh G. Nicely.)

Q. In fact that is a partnership consisting of Hugh G. Nicely and Art Helseth?

A. That is right.

Q. What is the business of the Nye Wrecking Company?

A. Well when machinery is being sold at the mill it is just difficult to get anybody to go up and take the machinery out so Mr. Helseth has a crew men there removing that machinery.

Q. Yes. A. That is right. [265]

Q. And at whose request?

Mr. Lennon: If the Court please——

Mr. Maury: We want to show the basis of this witness.

Mr. Lennon: I object to this question on this ground it has no bearing upon this lawsuit. The witness has testified with reference to some other portion of the mining site other than what is involved in this lawsuit. I cannot see any direct or indirect bearing on the issues involved here. I cannot see any connection whether this witness or somebody else is engaged in removing machinery from some other part of the mine.

The Court: It may be material. I will permit him to answer the question.

Mr. Maury: Read the question.

(Question read):

Q. And at whose request?

A. Persons purchasing machinery. Persons

(Testimony of Hugh G. Nicely.)

largely who have purchased the machinery in the mill.

Q. (By Mr. Maury): Mr. Nicely, have any houses been removed from the Lake Placer down the hill and intact as to frames?

A. From Lake Placer; not that I know of.

Q. None have been removed down intact?

A. None that I know of.

Q. How many are standing there now? I mean on the [266] leased ground. You are familiar with the boundaries of the leased ground?

A. You mean including the mine buildings or dwellings?

Q. I mean dwellings and store building if there is one, and school or anything?

A. Well it is the total whatever that was less 22.

Q. What? A. The total less 11, or 22.

Q. There have been 22 removed?

A. Yes, 22 removed.

Q. What was done with the houses that were removed?

A. Well they were demolished and the lumber was taken by the Reclamation Service for use in some of their projects.

Q. It was removed from the land?

A. From the Lake Placer.

Q. Now when did you commence taking the plumbing out of the buildings on the Lake Placer and on the leased land?

(Testimony of Hugh G. Nicely.)

A. It seems like it was around July, 1946.

Q. July? A. Yes.

Q. What part of July as near as you can remember unless you have written data on it?

A. I have but not here. I would say the first part of the month.

Q. Where is the written data? [267]

A. Up at the mill.

Q. Did counsel request you to bring the written data here? A. Did who?

Q. Any of the lawyers?

A. No, I just got my orders from Helena. Whether a lawyer or——

Q. And was there any request to bring all your written data as to that removal of the plumbing here to court? A. No.

Q. You were notified by someone that the trial would take place on a certain day?

A. I had a subpoena.

Q. You were subpoenaed? A. Yes.

Q. And by the defendants not by the plaintiff?

A. I don't know who it was.

Q. And was that subpoena—do you know what a subpoena duces tecum is or not?

A. Pardon.

Q. Did the subpoena command you to bring any data or books or memorandum or anything like that?

A. No, just told me to be down here ten o'clock Wednesday morning.

(Testimony of Hugh G. Nicely.)

Q. They never notified you, no one ever notified you to bring any data or any memorandum of what had been done there? [268]

A. I have no records up there.

Q. What are those records?

A. I imagine they are in the custody of War Assets at the moment at Columbus.

Q. In Columbus, that would be about forty miles from where this Court is being held, roughly?

A. Yes.

Q. How much of the plumbing, wiring, and other fixtures were removed from the leased property before the 1st of September, 1946, and after the 28th of February, 1946, I mean in that six months.

A. Well you have it all there in a document you submitted as evidence, the number of lavatories, toilets, bath tubs, and so forth.

Q. What I wish to know is was it all of the plumbing, all of the wiring and all of the fixtures insofar as they have been removed were they removed previous to August 28th, 1946?

A. That is right.

Q. Where were they put?

A. Well the biggest portion of them were stored in several buildings off of the Lake Placer in the school house and recreation room.

Q. And that was the biggest portion and where was the lesser portion stored? [269]

A. Oh, there was some of it in the 42-man bunk houses, some in the duplexes, some in three-room

(Testimony of Hugh G. Nicely.)

houses; wherever we could store it out of the weather.

Q. Were they on the leased premises or off?

A. Off.

Q. They were all stored off the leased premises?
A. That is right.

Q. In the upper camp and what we call the leased premises camp, that was connected with electric light and power?

A. It was all on the same system.

Q. There was one house moved previous to August 28th, 1946?
A. No partially demolished.

Q. Partially demolished?
A. Yes.

Q. Were there any others partially demolished before then?
A. No, sir.

Q. Now how many were all moved off after the 28th of August, 1946?
A. 22.

Q. 22 of them were?
A. Yes, sir.

Q. I mean all that were removed; there are some standing [270] there now?

A. In part they were demolished; they weren't moved wholly.

Mr. Maury: That is all.

Redirect Examination

By Mr. Lennon:

Q. Mr. Nicely, referring to the Plaintiff's Exhibit No. 23, representing a map, and particularly to the north portion thereof to the place where I am pointing even with the mine site?
A. Yes.

Q. Do the dwellings and buildings within that

(Testimony of Hugh G. Nicely.)

area, are they included within the Lake Placer claim? A. Yes, the first.

Q. And so again in Plaintiff's Exhibit 2 of the dwellings south of the line "M" "N" and west of the line "N" "O", they are within the what is known as Lake Placer claim?

A. Roughly. I didnt put that line on there. I could check upon it in a few minutes, but I guess it is.

Q. You can check. I don't want to guess.

A. Yes, that is right.

Q. Now, Mr. Nicely, with reference to the [271] plumbing fixtures that you referred to yesterday on direct examination, specifically the toilet, lavatory, kitchen sink, mirror, medicine chest, some were mirrors and others were medicine chests, will you explain the requirements, mechanical requirements for their removal?

A. Well generally you could reach the sinks in the kitchen and the sinks and the fixtures in the bathroom were back to back, you could generally reach both those through the same wall.

Q. And what would you do to remove them?

A. Disconnect pipe connections and in some cases take out a few pieces of moulding.

Q. And if you replaced them, you would go through the same motions in reverse, is that natural?

A. That is true.

Q. You stated for a portion of the time you were staying at what is called the guest house, where is

(Testimony of Hugh G. Nicely.)

that located, at the mill site? A. Mill site.

Q. Did you ever give any instructions to refuse Mr. Mouat or his guests or parties with him, did you ever give instructions to refuse him admittance?

A. No, sir.

Q. Do you recall at any time when he has come on to the mine either alone or with other people where they were [272] refused admittance?

A. Not to my knowledge. Not directly through me he had no trouble getting on that property.

Q. Well I am asking about what you know and you have stated what your connection with the mine was? A. Yes.

Q. Now Mr. Mouat never asked you for permission to remove a building, did he?

A. No, sir..

Q. Did anybody in his behalf ever ask to remove a building that you recall? A. No, sir.

Q. And as a matter of fact at any time he wanted to remove any property of his own you permitted him to do it?

Mr. Maury: Just a minute. Any property of his own involves a legal conclusion of a very serious nature.

Mr. Lennon: I will withdraw it.

Q. Any time he wanted to withdraw property you didn't refuse it, did you? A. No.

The Court: He said he never wanted to withdraw it, never attempted to?

A. That is right.

(Testimony of Hugh G. Nicely.)

Q. (By Mr. Lennon): You were describing a fence, Mr. Nicely. Is that the [273] fence around the condemned area of the mill site?

A. No, it doesn't follow any particular boundary.

Q. But at the gate No. 1?

A. That is the lower gate at the mill.

Q. There is a fence around there and that is what is known as the, that is the condemned area?

A. Not necessarily it doesn't fence the condemned area; it fences the mill site.

Q. Where is the condemned area?

A. It is roughly outlined in red.

Q. Referring to Defendant's Exhibit No. 23 with a red line starting on northwest corner of the map and coming down to line No. 5000 and then going west to a point at the Stillwater river, correct?

A. Yes.

Q. And then south to a point between 49,000 and 48,000?

A. That is right.

Q. And then west in a direct line to a point west of—how would you describe that point?

A. Oh, I would say it was a couple hundred feet south of the Monte Alto tunnel.

Q. A couple hundred feet west of the Monte Alto tunnel, that is what is known as the condemned area, correct?

A. Correct.

Q. With reference to any property that has been removed [274] or to be removed do you get orders

(Testimony of Hugh G. Nicely.)

as to how you are or where you will allow it to be removed?

A. Yes, it has to be certified sales document of that piece of equipment.

Q. On direction of higher authority?

A. That is where it comes from.

Mr. Lennon: That is all.

Recross-Examination

By Mr. Maury:

Q. Mr. Nicely, you spoke of wallboards being pulled in the removal of plumbing?

A. I said you have to cut a small piece of wall-board out between the kitchen and the bathroom to get to these unions.

Q. And what is that wallboard made of?

A. I don't know. Some kind of pressed fibre of some sort.

Q. And is it wood? A. Could be paper.

Q. Now was it wood?

A. No, it is not wood.

Q. What is it, it is made out of wood?

A. It is a patented process made of wood pulp.

Q. Made of wood? A. Yes.

Q. The condemned area and the leased area are two entirely different tracts of land, are they?

A. Right.

Mr. Maury: That is all.

Mr. Lennon: That is all.

LEE H. ST. JOHN

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lennon:

Q. State your full name.

A. Lee H. St. John, Seattle, Washington.

Q. Mr. St. John, you are an employee of War Assets Administration? A. I am.

Q. With your office at Seattle, Washington?

A. That is right.

Q. And you have been how long?

A. Oh, for about fifteen months.

Q. And in what capacity are you employed by War Assets Administration? [276]

A. Chief of the Disposal Branch, Appraisal Division, Seattle Region.

Q. Appraisal Division, Seattle Region?

A. That is right.

Q. And does the Seattle Region include the state of Montana, and particularly this Mouat mine site?

A. It includes Washington, Idaho and Montana.

Q. And you are a registered professional engineer?

A. In the states of Colorado and Washington.

Q. And what is your training as to your profession?

A. I matriculated in I.C.S. in Scranton, Pennsylvania in 1917, and I have been studying engineer-

(Testimony of Lee H. St. John.)

ing ever since, and I am a graduate of the LaSalle University, Chicago, and so on and so forth.

Q. Well what is so on and so forth? I want to get your qualifications here.

A. You mean what?

Q. How long you say you have been an engineer?

A. I have been an engineer for thirty years.

Q. What engineering societies are you a member of?

A. The American Association for Engineers, American Institute of Mining, Metallurgical Engineers.

Q. And have you been in the employ of any architectural architects?

A. Hollybed and Root, Chicago. [277]

Q. And in what capacity?

A. Chief Utility Engineer.

Q. And were you in charge of any particular job in connection with that work?

A. Well at the time I was with them they had approximately six hundred million dollars of contracts, and among the jobs was——

Q. Name a couple of them.

A. The Hotel Statler, Washington, D.C., and Hotel Northern in Billings.

Q. How about—did you have anything to do with Sun Valley?

A. I was Consulting Engineer for five years.

(Testimony of Lee H. St. John.)

Q. And in what capacity Consulting Engineer five years? A. Consulting Engineer.

Q. What, the construction or maintenance of it, or what?

A. Well it was just on generalities, whenever they had something come up when they wanted to use my services.

Q. Now have you any training with relation to ceramic engineering?

A. Somewhat. I made a study of it for around thirty years.

Q. Are you familiar with chromite mining?

A. To some extent.

Q. Now what are your duties as Chief of the Appraisal [278] Division of the Seattle Region of the Industrial Branch?

A. To classify and evaluate all industrial properties, including war plants of various kinds, rendition plants, metallurgical plants, mines, mills.

Q. Including the Mouat mine?

A. Including the Mouat mine.

Q. And when you say classify what do you mean by that?

A. Well by classification we mean what it is, what classification it goes into so far as 05, 07—

Mr. Lennon: This Court does not understand that.

Mr. Maury: How do you know?

The Court: Maybe it won't be necessary.

Q. (By Mr. Lennon): What do you mean by

(Testimony of Lee H. St. John.)

classification, what is to be done with the property?

A. Our classification is for what is to be done with the property, that is, for future use and so on and so forth.

Q. And do you value industrial plants for the purpose of sale and disposal?

A. For sale and disposal.

Q. Now was there a time when you visited the Mouat mine in connection with your official duties with War Assets? A. Yes.

Q. When was that?

A. The first time I visited the Mouat mine site was on [279] April 5th, 1947.

Q. And did you visit it again?

A. No, I did not.

Q. That was the only time you did visit it?

A. That is right.

Q. And did you make an appraisal on the buildings on the leased area involved in this lawsuit?

A. Yes, I did.

Q. And you have it in writing, reduced it to writing?

A. Well part of it. That is, the portion of 79 buildings that was off the area that was under litigation.

Q. By that you mean you valued the buildings north of the line, north of line "M" and "N" on Plaintiff's Exhibit No. 2, is that correct?

A. That is right.

(Testimony of Lee H. St. John.)

Q. As well as buildings east of the line "N" "O"?

A. That is right.

Q. Now the buildings you have just referred to are the same similar type of building the other side of that line within the leased premises, is that correct?

A. Yes, I went over all the buildings; that is, the ones within the boundaries.

Q. Well then you reduced to writing the valuations placed upon buildings off the lease?

A. That is right. [280]

Q. But you inspected all the buildings?

A. I inspected all the buildings.

Q. And at that time when you inspected the buildings within the leased premises were the plumbing fixtures removed?

A. Within the leased area?

Q. Yes. A. Yes, they were removed.

Q. Now with reference to the 11 buildings known as buildings No. 1 through 6, and 9, 10, 11—strike that—buildings 1 through 7 and 9, 10, 11, 12, you saw those buildings and made a valuation of them?

A. That was 11 buildings there, wasn't it?

Q. Yes. A. Yes, I went through them.

Q. And are they the same type as any building off the leased area on the townsite?

A. Yes, they were the same as three-room homes practically we worked up an appraisal on.

Q. And what valuation did you put on those 11 buildings as they stood?

(Testimony of Lee H. St. John.)

A. On those 11 buildings as they stood?

Q. Strike that out, please. What valuation did you place upon, for instance, the building marked "E" on Plaintiff's Exhibit No. 2, the one closest to the line "N" "O"?

A. But over the line?

Q. Yes. A. \$400.

Q. And that was the same type building as buildings 1 through 7 and 9 through 12?

A. That is right.

Q. And that was the valuation of that building?

A. Intact.

Q. Intact. All right, what was the difference between the value of the buildings intact and the 11 buildings I just referred to?

A. Oh, I would say about \$75.

Q. Now with reference to the 22 buildings that have been removed and particularly buildings No. 13, 14 and 15 and 19 through 35; you say those buildings had been removed at the time that you visited the site?

A. That is 22 buildings?

Q. Yes, they had been removed?

A. That is right.

Q. And naturally you never saw those buildings because they were gone?

Mr. Maury: Objected to as argumentative.

Mr. Lennon: I withdraw it.

Q. Do you know the type building constructed on those particular piers where the 22 buildings were removed?

A. Yes. [282]

(Testimony of Lee H. St. John.)

Q. And what type building was it by comparison with buildings off the leased area on the townsite?

A. Well, they were three-room buildings the same as——

Q. The 11? A. The 11.

Q. So they have the same valuation of \$400 intact? A. That is right.

Mr. Shone: \$400 each?

Mr. Lennon: That is right.

Q. (By Mr. Lennon): You were shown a list of plumbing fixtures and other types of fixtures that were removed from the townsite?

A. Yes.

Q. And the fixtures referred to by Mr. Nicely the last witness? A. Yes.

Q. And I show you a list of fixtures, the same list that was referred to in the examination of Mr. Nicely, and ask you if that is a list of fixtures, the same list of fixtures that Mr. Nicely testified was removed from the townsite?

A. That is right. That is the same list.

Q. And have you put valuations on this list as to each item that was removed as shown on this list?

A. I have. [283]

Q. And those are the value of the fixtures that have been removed? A. That is right.

Mr. Lennon: If the Court please, I offer this in evidence.

Mr. Maury: Before it is introduced may we ask a few questions?

(Testimony of Lee H. St. John.)

The Court: Very well.

Q. (By Mr. Maury): Mr. St. John, on what is now for identification Exhibit No. 24, there are listed toilets 22 each, has your value assessed here of \$444; that is for all of the 22?

A. That is right.

Q. Laboratories, 22 each, \$195.58, is that the same?

A. That is the same.

Q. Kitchen sink, 22 each, \$207?

A. That is right.

Q. Tanks, water, 30 gallon capacity, \$313.50?

A. That is right.

Q. And showers, \$247.72, right?

A. Right.

Q. And mirrors, \$19.80?

A. Right.

Q. As to that could the plumbing in that list there—what [284] would the plumbing in that list cost now here in Billings?

Mr. Lennon: Is it with reference to this you want to go through cross-examination?

Mr. Maury: No, we have a right to test out in a preliminary way whether this has any validity to be introduced in evidence.

Q. (By Mr. Maury): What would those items cost here in Billings? You have totaled them at \$1,424.17.

Mr. Lamb: Your Honor, we object as being entirely irrelevant what they cost in Billings.

Q. What would they cost to buy at the Mouat mine if they were there already?

(Testimony of Lee H. St. John.)

A. Well you mean cost of installation?

Q. I asked what the fixtures would cost?

A. For the one building?

Q. No, for all of those named in your first schedule here? A. Item by item?

Q. Yes.

A. Oh, I would say the first item would be about \$620.

Q. \$620? A. \$629.

Mr. Lamb: Your Honor, this appears to me to be cross-examination, not as preliminary questions to the [285] introduction of this exhibit. If he wants to cross-examine, we will give him full opportunity, but we offered this in evidence.

Q. (By Mr. Maury): Now who made this schedule?

A. That schedule was made up in our office?

Q. Did you help make it?

A. I verified it.

Q. I know you verified it but did you help make it? A. Yes, to a certain extent.

Q. Did you take any list of the stuff yourself?

A. I naturally had a man working on it.

Q. But were you there when he was working?

A. Yes.

Mr. Maury: All right, let it go in.

The Court: Very well, it will be received in evidence.

(Whereupon said Defendant's Exhibit No. 24, offered and received in evidence, is a part of this record and is in words and figures as follows, to-wit:) [286]

DEFENDANT'S EXHIBIT No. 24

Townsite Portion Mouat Lease

No. 1. House, 3 Room, 25'x24'x12'7", One floor wood structure 600 sq. ft., 1" sheeting and 1" drop siding. Total 22 each (all removed)

		Value
Toilets	22 ea.	440.44
Lavoratories	22 ea.	195.58
Kitchen Sink	22 ea.	207.13
Tanks, Water		
30 gal. Cap.	22 ea.	313.50
Showers	22 ea.	247.72
Mirrors	22 ea.	19.80

1424.17

No. 2. House, 3 room, 25'x24'x12'7", Description same as above, stripped and gutted. Total 11 each.

Toilets	11 ea.	220.22
Lavoratories	11 ea.	97.79
Kitchen Sinks	11 ea.	103.60
Tanks, Water		
30 gal Cap.	11 ea.	156.75
Showers	11 ea.	123.86
Mirrors	11 ea.	9.90

712.12

Defendant's Exhibit No. 24—(Continued)

No. 3. House 4 room, family dwelling intact without plumbing fixtures. Total 40 each. [287]

Bathtubs	40 ea.	1751.60
Lavoratories	40 ea.	446.40
Toilets	40 ea.	915.20
Kitchen Sinks	40 ea.	430.40
Medicine Chests	40 ea.	206.80
Tanks, Water		
30 gal. Cap.	40 ea.	570.00
		<hr/>
		4320.40

No. 4 House, Duples. Total 20 each.

Toilets	40 ea.	915.20
Lavatories	40 ea.	446.40
Showers	40 ea.	450.40
Medicine Chests	40 ea.	206.80
Tanks, Water		
30 gal. Cap.	40 ea.	570.00
Sinks, Kitchen	40 ea.	430.40
		<hr/>
		3019.20

No. 5. Bunkhouse, 42 man. 26'x4''x73'9''x21'3'', two floor. Sq. ft. area 3750. 4 each total. (Heated from Central Heating Plant).

Toilets	16 ea.	366.08
Urinals	8 ea.	73.51
Lavoratories	32 ea.	325.12
Tubs, Laundry	8 ea.	121.00

Defendant's Exhibit No. 24—(Continued)

Radiators, C.I.	80 ea.	387.60
Radiators	16 ea.	109.20
”	16 ea.	109.20
Fountain, drink	8 ea.	80.00
		<hr/>
		1571.71

No. 6. Mess Hall.

Panel, elec. switch	1 ea.	47.50
Toilet	1 ea.	22.88
Lavatory	1 ea.	10.16
Tank, Cond.	1 ea.	150.00
Heater, Elec.	1 ea.	90.00
		<hr/>
		320.54

No. 7 Store Building.

Lavatories	2 ea.	20.32
Toilets	2 ea.	45.76
Heater, Steam	4 ea.	144.00
		<hr/>
		210.08

No. 8 First Aid House.

Lavatories	2 ea.	20.32
Bathtub	1 ea.	43.79
Medicine Chest	1 ea.	2.25
Toilet	1 ea.	22.88
Sink, Kitchen	1 ea.	10.76
Radiators, C.I.	4 ea.	27.30
Heater, Water	1 ea.	90.00
		<hr/>
		217.30

Defendant's Exhibit No. 24—(Continued)

No. 9. Post office. Intact.

No. 10. Garage. Intact.

Total \$11,795.52

— — —

(Testimony of Lee H. St. John.)

Mr. Lennon: Now you may cross-examine.

Cross-Examination

By Mr. Maury:

Q. You have listed here in No. 1, toilets, laboratories, kitchen sinks, tanks, water 30 gallon capacity, showers, and mirrors, in how many buildings? A. That is in 22 buildings.

Q. 22 buildings and what would the plumbing fixtures that were in those 22 buildings cost new?

A. They would cost around \$2,762.98.

Q. Break it down.

Mr. Lennon: You mean as for one item?

Mr. Maury: No, sir.

Q. Break it down as to pieces.

A. As to pieces?

Q. Yes, what would the water tanks have cost?

A. Water tank would cost about \$28.50.

Q. What would the kitchen sink have cost?

A. About \$13.45 apiece.

Q. What would the laboratory have cost?

A. \$12.70 apiece.

Q. What would the toilets have cost? [291]

A. \$28.60 apiece.

Q. What would the showers have cost?

A. \$40.84 apiece.

(Testimony of Lee H. St. John.)

Q. What would the mirror have cost?

A. \$1.50 apiece.

Q. Now where would that price be?

A. That price would be at the mine.

Q. At the mine. Have you figured the cost of delivery from Billings to the mine?

A. It was considered, yes.

Q. Sir? A. It was considered, yes.

Q. How much was considered for that?

A. I couldn't answer that question right now. I am not prepared to answer it.

Q. Sir?

A. I wouldn't be able to answer that question authentically at the present time.

Q. You don't know how much you have put into your estimate, do you?

A. Well now you are talking on restoration program.

Q. No, I am hardly subject to your criticism. I am talking on what it would cost new the plumbing here in Billings?

A. What I was going to do was explain to you.

Q. Oh, well, go right ahead.

A. You are speaking for the restoration program which I did not have full data at the present time to give you.

Q. Yes.

A. I could to some extent but not on a breakdown.

Q. You couldn't break it down? A. No.

(Testimony of Lee H. St. John.)

Q. Have you bought recently any articles such as are described here in Billings?

A. Not in Billings, no.

Q. Where is the closest place that you have bought any of the articles mentioned in this list?

A. Seattle.

Q. Seattle, of course, enjoys ocean freight?

A. It is a pretty high priced town. According to the Bureau of Statistics it is the highest price town in the United States outside of Billings.

Q. I know but you might answer the question it enjoys ocean freight? A. Yes.

Q. Now as to the No. 2 houses, those listed in No. 2, have you a copy of this?

A. I believe I have, yes.

Q. What could you get the plumbing for?

A. What is that? [293]

Q. What could you buy all of the plumbing in the No. 2 list here for in Billings?

Mr. Lennon: You are referring to plumbing fixtures or the whole thing?

Q. The whole thing?

A. Now you asked that question here in Billings?

Q. Yes.

A. Do you mean to go out and purchase those articles one by one from some retail store or purchase them by wholesale and in a large quantity and have them brought in as would be the case in a restoration program?

(Testimony of Lee H. St. John.)

Q. Yes, either way—both ways?

A. Well your question there is kind of funny owing to the fact that if a restoration program of that kind was to take place, those fixtures would not be purchased directly at Billings, that is, unless some purchaser could make his bid low enough to meet the requirements. You just don't go out and buy from the first man that has something to sell when you buy for a construction program on a large scale.

Q. Yes.

A. Consequently, owing to that fact I couldn't answer that question as to the price we could get them here in Billings for. I might answer the question what they might be laid out in Columbus for or up at the mine. I would say that we could put them up to the mine for about the same cost as [294] I mentioned before.

Q. Plumbing supplies and everything have gone up in the last three years in price?

A. To some extent, yes. However, we find it very difficult at times to get rid of it in Seattle.

Q. Now, Mr. St. John, we will get to that restoration. What would it cost to restore that plumbing to those buildings and put it in the position wherein it was in March of 1946?

A. You mean the 22 houses?

Q. I mean all of them that are on the leased ground?

(Testimony of Lee H. St. John.)

A. You mean the 22 houses and all the plumbing fixtures?

Q. Yes.

A. In all the buildings on the leased ground?

Q. Yes.

A. I would say roughly speaking in the neighborhood of ninety or ninety-five thousand dollars.

Mr. Maury: Thank you.

A. That is just roughly speaking.

Mr. Maury: That is all.

Redirect Examination

By Mr. Lennon:

Q. With reference to one particular house, any one of [295] the 22 that were removed, that the plumbing fixtures were removed, what would it cost to actually connect up in one particular house to reinstall the fixtures that had been removed?

A. To reinstall the fixtures that had been removed in one particular house?

Q. Yes. A. Those three-hoom houses?

Q. Any one of the 22 that have been removed assume the fixtures were laying outside and you had to reinstall them, what would be the cost of that in your judgment? A. Including fixtures?

Q. The five or six items there shown to re-connect them up, the plumbing?

A. Oh, I would say around \$125 a building.

Q. When you gave the figure to counsel for the cost of restoration is that figure given on the theory

(Testimony of Lee H. St. John.)

that there is reason for restoring them to the extent that the buildings have a commercial use?

Mr. Maury: We object to that; that has no connection with the cost of restoration. That couldn't enter into a calculation. I asked him for the cost of restoration but not purpose afterwards.

A. I will answer your question absolutely not.

Q. Did you say yes or no? [296]

A. I said no.

The Court: Read the question.

(Question read.) Q. When you gave the figure to counsel for the cost of restoration is that figure given on the theory that there is reason for restoring them to the extent that the buildings have a commercial use?

Mr. Maury: And I objected that couldn't possible enter into the statement of the compilation or estimate of the same; what use they were put to would have nothing to do with the cost.

Mr. Lennon: Just a minute, the court has to make a ruling here.

The Court: I will let him answer it.

Mr. Lennon: Read the question.

(Question read.) Q. When you gave the figure to counsel for the cost of restoration is that figure given on the theory that there is reason for restoring them to the extent that the buildings have a commercial use?

A. No, because I don't believe they have commercial use at the present time.

Mr. Maury: We object and move to strike out

(Testimony of Lee H. St. John.)

the latter part. We moved to strike out the last part of the answer as not being responsive.

The Court: Yes, strike it out. [297]

Q. (By Mr. Lennon): Mr. St. John, you just testified on cross-examination to Mr. Maury's question, the question that the restoration value of these items is \$95,000, \$90,000 or \$95,000?

A. Approximately that.

Q. Now with reference to that question and answer I ask you this question. When you gave that testimony as to the approximate restoration value is that value based upon restoring the fixtures to buildings which would then as restored have a commercial and useable value in place?

Mr. Maury: We object to that; it couldn't possibly enter into the cost of restoration and is entirely different from whether the buildings could be sold afterwards or not.

The Court: Well it seems to me that very question, the cost of restoration, really is to determine the value of that property. That is, what it would cost to restore it and put it back in place, the value of that. Now that hasn't anything to do with commercial value or whether it could be put to commercial use or not as I see it. What would it cost to restore it? Well, he testified what the value would be, restoration cost. That doesn't come into the calculation here I wouldn't think.

Mr. Lennon: I will withdraw my question then, your Honor, and the answer.

(Testimony of Lee H. St. John.)

Mr. Maury: We won't permit the answer to be withdrawn [298] unless the court forces us to. The answer stood there to my question. The answer stood there.

Mr. Lennon: I am withdrawing my question.

Mr. Maury: Oh, your question, that is all right.

Mr. Lennon: And the one before the last too and the answers.

Mr. Lennon: That is all.

Mr. Maury: That is all.

HENRY C. HELLAND

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lennon:

Q. What is your full name and address?

A. Henry C. Helland, Helena, Montana.

Q. You are a former employee of the War Assets Administration? A. Yes, I was.

Q. In what capacity?

A. I was Regional Director, War Assets Administration, Region 29, comprising the State of Montana.

Q. With offices at Helena?

A. With offices at Helena. [299]

Q. And when did you take over your duties?

A. I was appointed Regional Director in May of 1946, and held the position—and resigned the end of May of 1947.

(Testimony of Henry C. Helland.)

Q. And what is your employment at the present time?

A. I am General Manager, Carson Construction Company at Helena, Montana.

Q. And in the course of your duties as Regional Director did you have occasion to visit the Mouat mine site? A. I did.

Q. And you are familiar with the type dwelling house constructed on the leased area?

A. I am.

Q. And also the type of house off the leased area of the townsite, but on——

A. On Forest Service land.

Q. North of the "M" "N" line and west of the "N" "O" line? A. Yes.

Q. And were some of those buildings sold by War Assets Administration through your office?

A. Yes, I have known what buildings in the Mouat were sold.

Q. I am talking about the last mentioned group off the leased area?

A. Yes, they have been sold. [300]

Q. Some of those off the leased area have been sold, similar type buildings? A. Correct.

Q. And approximately how many were sold?

A. In the dwelling category there were 53.

Q. And what were they sold for?

A. Well there were thirty duplexes which were sold for \$500 per building, and there were 23 three-

(Testimony of Henry C. Helland.)

room houses which were sold for \$400 per building.

Q. Was that intact?

A. That was intact with plumbing fixtures complete.

Q. Now I show you Defendant's Exhibit No. 20. Will you state what that is, please?

A. Yes, this is a declaration of surplus, commonly known as SWPA-5, declared Plancor No. 587 on the Mouat mine and mill surplus, War Assets Administration.

Q. You use the words "Plancor No. 587", will you explain what that term is?

A. Plancor was a term used by the Defense Plant Corporation to enumerate the plants which were built by them and they were numbered for use in reference. Now the Mouat mine and mill was Plancor 587, which comprised not only the mill, the mine site, mine development, transmission lines, and the access road which were built under funds provided for Plancor 587. [301]

Q. Are you familiar with the type of the oil cooking stove that was in the buildings within the leased area of the townsite?

A. Yes, I am.

Q. Will you describe them, please?

A. Well the oil cooking stoves were a flat top iron top with white porcelain box on the stove consisting of an oven and cooking surface on the top. They were oil fired, connected to an oil tank, with a fan built in the stove for draft, an electric fan.

Q. And how were they connected with relation

(Testimony of Henry C. Helland.)

to the tank location and where the stove is located?

A. Well the stove, of course, is located in the kitchen with the pipe connecting to the tank which was located outside.

Q. That was commonly known as a cook stove?

A. That was a cook stove, yes. However, it was used for heating purposes because usually that was the only heat in the buildings.

Mr. Lennon: That is all.

Cross Examination

By Mr. Maury:

Q. Who did you sell these buildings to?

A. Well these buildings were sold subsequent to the time [302] I left War Assets Administration.

Q. And you don't know, of course, of your own knowledge what happened to them?

A. Yes, I do. We bought seventeen of them.

Q. Who bought them?

A. Lyons and Flynn of Billings bought 18, and McCan of Missoula bought 18.

Q. By you who do you mean?

A. Well, the Carson Construction Company.

Q. For whom you are the Manager?

A. Yes.

Q. And with whom did you deal when you bought these buildings?

A. Well the firm dealt with Reconstruction Finance Corporation.

Q. I know but—and when was that dealing taking place?

(Testimony of Henry C. Helland.)

A. That took place in the last of September of this year. We received a sales document on the 23rd of October.

Q. From Reconstruction Finance Corporation?

A. We received the sales document from War Assets Administration.

Q. Well the negotiations were with Reconstruction Finance Corporation?

A. Correct, but Reconstruction Finance Corporation was merely acting under section 18-e, surplus property, whereby [303] they were charged with the exercising of priorities for the purchase of surplus property for small business.

Q. And yours was small business?

A. Right.

Q. And you got the priority? A. Yes.

Q. For buying that property? A. Right.

Q. And that was priority over everybody else?

A. No.

Q. Who was there who was priority over you?

A. Well the Federal Government has top priority, any Government Agency.

Q. But the Federal Government had priority ahead of you? A. Yes.

Q. And you had the next priority?

A. Yes.

Q. Was that a public sale? A. Yes.

Q. When held?

A. The sale was held in Seattle. The documents were opened at Seattle.

(Testimony of Henry C. Helland.)

Q. The sale took place in Seattle? That is in the state of Washington? A. Right. [304]

Q. And how long was the sale advertised in Montana?

A. Oh, it was I would say about two weeks before then.

Q. Whereabouts? A. Whereabouts?

Q. Yes.

A. Well it was in the Helena Independent for one.

Q. Any Billings paper?

A. That I don't know; I am not connected with War Assets.

Q. You don't know what it was in?

A. I imagine it was in the Billings paper.

Q. You imagine so?

A. It is customary, yes, for them to put them in the larger city papers.

Q. Did it tell where the sale was to take place?

A. Yes.

Q. Where?

A. If you have read any of these War Assets Administration——

Q. No, my only contact with War Assets Administration was not with you in Helena when you were trying to sell this property.

A. In the advertisement they tell in what order the priorities will be taken up, and the points at which the bids will be opened, and how the bids are to be submitted, and what is to be submitted, de-

(Testimony of Henry C. Helland.)

posits or whatever else is to go [305] with the bids, and complete instructions with each advertisement.

Q. And in that advertisement why it was stated that you had a priority. A. No.

Q. I thought you said you had a priority?

A. Certainly. It didn't mention we had a priority. It said Federal Government of the United States, and Reconstruction Finance Corporation for assistance of small business No. 2.

Q. You were a R. F. C. priority for assistance to small business? A. Yes.

Q. All right.

Mr. McKevitt: Your Honor, it is a matter of statute; small business is a matter of statute.

Q. (By Mr. Maury): Do you know whether any other bids were put in but yours?

A. Yes, I know Lyons and Flynn of Billings and McCan Construction Company of Missoula.

Q. And were their bids exactly the same as yours?

A. Well for the sale of this property under priorities there is no actual bid.

Q. There is no actual bid? [306] A. No.

Q. There is nothing in the nature of an auction, whichever way you want to call it?

A. There is nothing in the way of auction for priority buyers.

Q. And who named the price that you were to pay? A. War Assets Administration.

Q. What person in War Assets Administration?

(Testimony of Henry C. Helland.)

A. The Real Property Disposal Division in Seattle. The Appraisal Division makes, sets the fair valuation at which they are sold to priorities.

Mr. Maury: That is all.

Redirect Examination

By Mr. Lennon:

Q. When were the fixtures sold that were removed from the Mouat lease property?

A. The fixtures were sold I would say some time after the 1st of September of 1946.

Q. Then they were sold by War Assets Administration?

A. All the fixtures were sold by War Assets, yes.

Q. With reference to the sale or purchase from R. F. C. no purchases were made by you personally, is that correct?

A. That is correct. [307]

Q. When they referred to you, you were talking about the firm for whom you work?

A. Carson Construction, yes.

Q. And according to statute the sale is made to R. F. C. and then R. F. C. to small business, that is by statute?

A. Yes.

Mr. Maury: The statute speaks for itself; the witness is not competent to tell us about the statute and we move to strike the answer.

The Court: You might put the statute in there if you make reference to it.

Mr. Lennon: You were asking about it and I have the right to clear that point up.

(Testimony of Henry C. Helland.)

The Court: I think so, but if you know the statute, give it.

By Mr. Lennon: You mean to ask the witness, sir?

Q. Do you know the citation?

A. Yes, under Section 18e of the Surplus Property Act.

Q. Of 1944?

A. 1944. Small War Plants Corporation was charged with responsibility of assisting small business in securing surplus property. When Small War Plants Corporation went out of existence the responsibility of helping small business was transferred to Reconstruction Finance Corporation. Then there was some question at the time of the limiting date of Small [308] War Plants Corporation as to whether that right would still vest in Reconstruction Finance Corporation but it has since been clarified and decided that they are still charged with responsibility of aiding small business.

Mr. Lennon: That is all.

Mr. Maury: That is all.

DANIEL E. McCARTHY

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lennon:

Q. State your full name and address?

A. Daniel E. McCarthy, Columbus, Montana.

(Testimony of Daniel E. McCarthy.)

Q. And you are in the employ of War Assets Administration at Columbus, Montana?

A. Yes, sir.

Q. In what capacity?

A. I am in charge of personal property, in charge of warehouse and the office.

Q. In Columbus? A. Columbus, yes.

Q. And have been how long?

A. I have been acting in this capacity since about [309] March of this year and I have been working down here at Columbus since the first part of September in 1946.

Q. Are you familiar with the disposal of the fixtures, plumbing fixtures and other fixtures that were removed from the Mouat mine?

A. Yes, sir.

Q. I show you Defendant's Exhibit No. 24 showing the list and price or rather value, showing the items of personal property—or I will strike that out—items which were sold here, that is, sold at your office?

A. The majority of them have been.

Q. And were you requested to abstract from the documents in your office the particular items as referred to on that sheet? A. Yes.

Q. And you made that compilation?

A. Yes.

Q. As to the items? A. Yes.

Q. And the values that are placed along side of each item will you state what those values represent?

(Testimony of Daniel E. McCarthy.)

A. Well this value that is estimated here represents an estimated sales return value.

Q. And the value set along side each item is what the item was sold for by War Assets? [310]

A. That is correct.

Q. Now do you know anything with reference to the instructions that were given concerning whether or not Mr. Mouat could go on the mine site?

A. Mr. Mouat was granted the same privileges that was granted to anyone else or any party or any individual or group of parties that wanted to inspect the mine, mill site or mine site. Wherever there was surplus things or property being inspected he was granted those same privileges.

Mr. Lennon: That is all.

Cross Examination

By Mr. Maury:

Q. Did you issue a pass to him?

A. Offhand I won't say for sure, although I have issued numerous passes to individuals.

Q. This was the kind of pass that was issued?

A. This was one type of pass that was issued, yes.

Q. And I am calling your attention to Exhibit No. 3? A. Yes.

Q. Now to whom did you sell this fixtures and plumbing and everything?

A. These fixtures were sold to various buyers.

(Testimony of Daniel E. McCarthy.)

In fact, [311] the majority of them went to other Federal Agencies. By that I mean Bureau of Reclamation or the Federal Public Housing Authority.

Q. And the prices were just bookkeeping entries between the departments of the Government?

A. Repeat that question.

Q. The prices were simply bookkeeping entries between departments of the Government?

A. Yes.

Q. What department were some of them sold to?

A. The Bureau of Reclamation, Billings, Montana.

Q. And that is a department of the United States Government?

A. Correct.

Q. What were the others sold to?

A. Federal Public Housing Authority received some of these fixtures. I believe they received some of them. They received all the fixtures that was in the 22 buildings that were torn down.

Q. And when was that received? When did they get possession of it?

A. Oh, in September or October.

Q. What year?

A. 1946.

Q. Were you connected with the War Assets Administration [312] then or not?

A. Yes.

Q. And then as to the rest of the fixtures who got them?

A. Well various individuals received, oh, maybe five or six items of each type. Offhand I couldn't

(Testimony of Daniel E. McCarthy.)

tell you every individual that purchased them. There were several individuals that bought them at some of the sales that were conducted.

Q. Did you keep books on those? A. Yes.

Q. And were you requested to bring your books here to the trial? A. No, I wasn't.

Q. Every item was mentioned in those books, was it not, Mr. McCarthy? Every item sold was mentioned, wasn't it?

A. They were documented.

Q. What? A. They were documented.

Q. Documented? A. On paper, yes.

Q. And you had charge of the documents?

A. That is correct.

Q. Exact lists were made, were they not?

A. Exact list were made by our office in conjunction with personnel from Helena in the Helena office.

Q. But yours was added to the duplicated original set? [313]

A. Yes, we have a delivery copy for the delivery on release of these items.

Q. Mouat didn't have any more right to go in there than anyone else, did he as far as your authority was concerned?

A. I would like to have you say go in where.

Q. To the Lake Placer to all of those buildings that are on the leased ground?

A. As far as I am concerned he was granted the same privileges as any other individual.

(Testimony of Daniel E. McCarthy.)

Q. But no greater privileges than any other individual?

A. Personally I did extend him more privileges.

Q. What were the nature of those privileges?

A. Well I took it upon myself and I said he could go in there whenever he wanted and he came to my office several times in quest of bulletins and what not and he was always favored in that respect.

Q. Yes, you gave him bulletins about what you were going to do with the property, is that it?

A. Yes, when he asked for them.

Q. Now at times he had to call you on long distance from the property or the lower camp to Columbus to get permission to go in, didn't he?

A. No, sir.

Q. Were you there on or about the first week in September, 1946? [314]

A. I was in the Columbus office, yes.

Q. When there was a call came in that Mouat and other people couldn't go through?

A. The time you are referring to in September I was not in charge of that office.

Q. Were you there?

A. I was working there.

Q. And you heard that call? A. No, sir.

Q. You don't know of that? A. No.

Mr. Maury: That is all.

Redirect Examination

By Mr. Lennon:

Q. The document that you have there, Defend-

(Testimony of Daniel E. McCarthy.)

ant's Exhibit 24, is this an abstract of the voluminous record you have on file in your office?

A. Yes.

Mr. Lennon: That is all. [315]

Recross Examination

By Mr. Maury:

Q. How voluminous is that record? I mean so far as it pertains to this property.

A. It is a fairly accurate estimate as to the quantity and values there of it.

Q. Is it loose leaf? A. Pardon.

Q. Is it on loose leaves? A. No, sir.

Q. How big is the book that they were written in?

A. It was compiled of data that was their form of bookkeeping. When this paper was recorded it is on one document and then it is sold, maybe one item might be reported as quantity of 22 each and it might have been sold to several individuals and we have different documents for each different sale and it is compiled.

Q. Who made the abstract here?

A. Various War Assets personnel including myself.

Q. Who were some of them?

A. Myself, Mr. Nicely, Mr. St. John.

Q. Those were the three that got access to the original documents, to the original entries?

A. And Mr. Newton another employee in the warehouse. [316]

(Testimony of Daniel E. McCarthy.)

Q. And they had the original documents in the warehouse? A. That is correct.

Mr. Maury: That is all.

Redirect Examination

By Mr. Lennon:

Q. And each sale is documented and you had to refer to each one of those documents to get this data, is that correct? A. That is right.

Mr. Lennon: That is all.

Mr. Maury: That is all.

ARTHUR S. HUTCHINSON

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. McKevitt:

Q. Your name, please.

A. Arthur S. Hutchinson.

Q. Where do you live?

A. Washington, D. C.

Q. By whom are you employed?

A. Reconstruction Finance Corporation. [317]

Q. What degree do you hold?

A. I am a graduate of Stanford Law School.

Q. Do you hold an engineering degree?

A. No, I am a lawyer.

Q. Are you the Mr. Hutchinson who was in court yesterday and referred to? A. I am.

Q. In the testimony of Mr. John Norton?

A. Yes.

(Testimony of Arthur S. Hutchinson.)

Q. And you were here and heard the testimony of Mr. Norton? A. I did.

Q. Mr. Hutchinson, do you agree with the testimony——

Mr. Maury: We object as not a proper question—do you agree with the testimony of a certain witness? He can give his own testimony.

Mr. McKevitt: Your Honor, I am trying to shorten this. I think it is proper enough.

The Court: Well you can ask him if he sat here and heard it all and heard every word of it and if it is correct as he understood it.

Mr. McKevitt: That is what I am trying to do is shorten it down.

Q. (By Mr. McKevitt): You heard the entire testimony of Mr. Norton yesterday? [318]

A. Yes.

Q. Do you agree with the testimony given in this case yesterday by the witness John Norton with respect to conversations had with Mr. Mouat at the time the lease involved in this case was being negotiated? A. I do.

Q. And you are the Mr. Hutchinson who was present the the negotiations for the lease involved in this case? A. Yes.

Q. Mr. Hutchinson, did you have any conversation with Mr. Mouat at the time with respect to including the word “townsite” in paragraph 22 of that lease?

Mr. Maury: We object as an attempt to vary the contents of a written document that has not been

(Testimony of Arthur S. Hutchinson.)

put in issue in this case; it has been agreed to in the answer as being the exact copy.

Mr. McKevitt: Your Honor, this is along the same line of the testimony we used yesterday.

The Court: Yes, I said I would let them show their theory of it and we will see what they are trying to do; whether they will succeed or not will depend on what the court concludes later on. It will be received subject to objection.

Mr. Maury: All of it along this line.

The Court: Yes, all of it.

Mr. McKevitt: Read the question. [319]

(Question read.)

Q. Mr. Hutchinson, did you have any conversation with Mr. Mouat at the time with respect to including the word "townsite" in paragraph 22 of that lease?

A. I was present during negotiations.

Q. Would you answer that yes or no?

A. Yes, I was present during the negotiations which were conducted primarily by Mr. Norton with Mr. Mouat.

Q. Would you repeat the substance of that conversation with respect to including the word "townsite" in the lease, paragraph 22 of the lease?

A. Well in June of 1941, Mr. Norton was out here and negotiating with Mr. Mouat for a lease. That lease was not acceptable to Reconstruction Finance Corporation but I used it as a form for preparing the lease in evidence. That lease of '41, among other things, provided——

(Testimony of Arthur S. Hutchinson.)

Mr. Maury: We object to any statement of the contents of that lease unless the lease is here.

The Court: Confine your answer to this particular question.

A. Well Mr. Norton informed Mr. Mouat that more than one townsite, more than one mill site, more than one tailing disposal, and such matters, would undoubtedly be required and it would be necessary to put all of those terms in the plural in this lease that is in issue.

Q. And how much land did you ultimately decide would be [320] needed for the townsite and millsite purposes? A. 200 acres.

Mr. McKevitt: That is all.

Mr. Maury: Just a moment, have you got that old lease, copy of that old lease?

Cross-Examination

By Mr. Maury:

Q. Would you recognize a carbon copy of that first lease, Mr. Hutchinson?

A. I think I would.

Q. Would you say that this document excluding the pencil notations in red and black was a carbon copy of that first lease you are talking about excluding the pencil notations?

A. Yes, I am going to exclude the pencil notations. Well, this looks as if it might be. I notice in paragraph 24 here it refers to "Promptly upon receipt of lessee's written request, lessors will execute and deliver to lessee a quit claim deed to all of lessors' right, title and interest in and to prop-

(Testimony of Arthur S. Hutchinson.)

erty to be designated by lessee for use by lessee for mill sites and stock piling." Now, I used affidavits——

Q. Is that a carbon copy?

A. I say it looks like one. I have a carbon copy of it. [321]

Q. Will you produce that?

A. Yes, I will.

Q. Your own copy?

A. Yes, I would rather use it. If you hadn't objected, I could have saved a little time. Here is a carbon copy. That is the carbon copy I used when we were here in December, 1941, to prepare the present lease.

Q. And this, of course, has many interlineations?

A. It has as a result of conferences and negotiations with Mr. Mouat. Those are the things that we insisted upon and some that he insisted upon. Down there, 22, at the bottom of the page, Mr. Maury.

Q. Yes, I will get it. This document was in existence in June, 1941, wasn't it, Mr. Hutchinson?

A. I believe it was as a piece of paper.

Q. And was it written on?

A. I don't know what you mean was it written on.

Q. Was the carbon copy made then, Mr. Hutchinson?

A. I don't know as to that. I believe it was for the reason that you notice that it is what is called

(Testimony of Arthur S. Hutchinson.)

a conformed copy; it shows the signatures in type-writing.

Mr. McKevitt: Do you want to put the document in because the record won't otherwise show what we are talking about.

Mr. Maury: Yes, I will identify it. [322]

Whereupon said document was marked for identification Plaintiff's Exhibit No. 35.

By Mr. Maury:

Q. And this lease drawn in June of 1941 about six months before the present lease had this wording in it, did it not, Mr. Hutchinson? Paragraph 17 it was; it is now penciled in "15"?

A. That is right.

Q. "Upon the termination of this lease by either party, lessee shall surrendered peaceably the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and the lessors shall have the right to re-enter upon said leased premises and appurtenances—can you read what was there under what is penciled?

A. And possessory claims.

Q. Yes, sir. "and take full and complete possession of the whole thereof. Upon the expiration of this lease or the termination of this lease for any reason by either party, lessee shall have six (6) months additional time to remove from the leased premises its personal property, equipment, machinery, tracks and tramways, but shall leave intact all

(Testimony of Arthur S. Hutchinson.)

mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings [323] erected upon the demised premises and ore on dumps upon which royalties have not been paid lessors." That was in the lease of June? A. Yes.

Q. In fact there was very little difference between the lease of June and the lease of September except the lease of June called for minimum royalty of \$30,000. per year and the lease of December for a minimum royalty of \$10,000?

A. No, that isn't at all correct.

Q. Now was paragraph 22 in this original lease drawn in June: "Lessee agrees with the Lessors that unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased upon the termination hereof, for a period of six months after such termination, shall conclusively be deemed to have been abandoned by the Lessee in favor of the Lessors."

A. Yes.

Q. That was in both leases. I think I can finish with you in a minute or two. Were you present when M. W. Mouat signed the lease?

A. Oh, yes.

Q. Where was it signed?

A. I think at his house at the—I guess you call it Nye.

Q. At Nye there, the camp there? A. Yes.

Q. And when you got there there was present Judge Henry L. Myers? A. Yes.

(Testimony of Arthur S. Hutchinson.)

Q. Yourself? A. Yes.

Q. M. W. Mouat? A. Yes.

Q. Mrs. Mouat? A. Yes.

Q. Was Mrs. Mouat in bed when you arrived?

A. Not that I know of. When I walked in the house Mrs. Mouat was up and about and I was introduced to her.

Q. Cooking dinner?

A. I think she was because I enjoyed a dinner there.

Q. Now the discussion that you talk about between Bill Mouat, as we call him, and John Norton, where did that take place?

A. There were numerous discussions.

Q. Well where did one of them take place?

A. Give me a chance and I will tell you. They started in the Grand Hotel.

Q. Yes.

A. And then we adjourned to the Montana Power Company office.

Q. Yes. [325]

Q. Yes.

A. And stayed there until two o'clock in the morning.

Q. Yes.

A. Writing and having this lease typed.

Q. Yes.

A. And Mr. Mouat negotiated and discussed the terms during all of those times.

Q. Yes.

A. Right up until the last page was typed.

(Testimony of Arthur S. Hutchinson.)

Q. And then when it was typed you all the next day some time drove about ninety miles to where Mrs. Mouat was? . A. That is my recollection.

Q. And Judge Myers or Senator Myers walked in and said "Mrs. Mouat, sign here." And she said "I can read, you don't have to"—you were trying to read it to her? A. I was?

Q. Yes.

A. Well I may have read some section or paragraph that she asked me to read but I have no recollection of reading the lease to her; I deny anything of that sort.

Q. I know, but she informed you that she could read herself, didn't she?

A. No. She may have there was some visiting going on I dare say.

Q. And that is all the conversation about business matters [326] that took place in that house?

A. No, that was not all the business conversation. Mr. and Mrs. Mouat called me in the dining room and asked me if there was anything in that lease they didn't understand and did I think it was a fair lease and all right for them to sign and I told them I was an employee of the Reconstruction Finance Corporation, an instrumentality of the United States Government, and I thought they were getting a very fair lease and I didn't see any objection to their signing it.

Q. And they both thanked you?

A. I think so.

(Testimony of Arthur S. Hutchinson.)

Q. And now you have detailed to the court all the conversation that took place about the lease to Mrs. Mouat?

A. I wouldn't say that. I can't remember all the details of the conversation that took place six years ago. I will give you the substance.

Q. Now was there anything else or substance that was said to Mrs. Mouat, if so, tell the court what is was on that day?

A. I don't recall anything else or substance that was said to Mrs. Mouat by me.

Q. Do you recall anything else or substance said to Mrs. Mouat as to what Senator Myers said "Here is the lease; read it, sign it."?

A. I don't recall that Senator Myers said "Here is the [327] lease; sign it." I don't recall that language. If you doubt Mrs. Mouat can read—she read the lease and discussed it thoroughly with her husband.

Mr. Maury: We move to strike out the answer as a voluntary statement.

The Court: Yes, let it go out.

Mr. McKevitt: Have you offered this or is it simply for identification?

Mr. Maury: Just for identification and for those two paragraphs.

The Court: I think the record will show that identification of it is called to his attention or is in the record, is it not?

Mr. Maury: I don't think it is identified.

(Testimony of Arthur S. Hutchinson.)

The Court: I think you better identify it so we will know.

Mr. McKevitt: I think we might explain what has been marked Defendant's Exhibit No. 25 and referred to on cross-examination by that name should be Plaintiff's Exhibit 25 for identification. Would that be sufficient?

The Court: The cross-examination of this witness referred to that document, is transcribed on Exhibit 25.

Mr. Maury: That is penciled all over and monograms put on that I don't understand. [328]

Redirect Examination

By Mr. McKevitt:

Q. Mr. Hutchinson, referring specifically to Plaintiff's Exhibit No. 25 for identification, which is the instrument from which counsel just read, what is marked in here 24 and stricken out and 22 shown above it, which reads as follows: "Promptly upon receipt of Lessee's written request, Lessors will execute and deliver to Lessee a quit claim deed to all of Lessors' right, title and interest in and to property to be designated by Lessee for use by Lessee for mill sites and stock piling." Now I ask you to look at the exhibit and tell me whether a word has been added there in pencil writing?

A. Yes.

Q. And what is the word? A. Townsite.

Q. And would you explain to the court why it was necessary to add "townsites"?

(Testimony of Arthur S. Hutchinson.)

Mr. Maury: Objected to as not proper redirect examination.

Q. Was there any discussion with Mr. Mouat with respect to necessity of having fee title to townsites?

A. Yes, this form which is the June, 1941, instrument did not have any reference to townsites or tailings disposal area, and Mr. Norton explained to Mr. Mouat in my presence [329] at length the necessity for the Government having mill sites and town sites, and stockpiling area, and tailings disposal area, and I wrote the word "townsite" in there and after further discussion it was changed to townsites, plural, and that is the way it is in the lease in issue.

Q. And what was that necessity?

Mr. Maury: We object as too remote and further attempt to vary a written instrument not in issue.

(Witness): I don't think it is remote.

Mr. Maury: We don't ask for your opinion. We ask for the court's opinion.

Mr. McKevitt: Your Honor, the plaintiff started all this on cross-examination on this instrument.

The Court: Yes, I think, so let him state briefly in reply.

(Witness): This pertains to the negotiations for the lease.

Mr. McKevitt: Excuse me, Mr. Hutchinson.

Mr. McKevitt: Would you read my question?

(Testimony of Arthur S. Hutchinson.)

(Question read.) Q. And what was that necessity?

Mr. Maury: We object, the witness is not competent to answer what the necessity was. That would be dependent on mining engineers, metallurgists, road builders and everything.

The Court: Well I expect that objection would be good. I will sustain it and you will have to stop and qualify [330] him if you can. We will quit here and take a recess until two o'clock this afternoon.

The court resumed, pursuant to recess, at 2:00 o'clock P.M. on November 14, 1947, at which time parties and counsel were present.

The Court: Proceed, Gentlemen.

(Arthur S. Hutchinson resumed the stand and testified as follows:)

Redirect Examination—(Continued)

By Mr. McKevitt:

Q. Mr. Hutchinson, in your discussion with Mr. Mouat was it explained why it was necessary that the word "townsite" be included in what is now paragraph 22 of the lease? A. Yes.

Q. And what was the reason it was so explained in that conversation?

A. We told Mr. Mouat that this was going to be a very large undertaking and a great deal of money was going to be spent and we had to have so-called

(Testimony of Arthur S. Hutchinson.)

fee land, that is, land that would be owned by the Government on which these expensive improvements would be placed. [331]

Q. You mean townsite improvements?

A. Yes, townsite and millsite.

Mr. McKevitt: That is all.

Recross Examination

By Mr. Maury:

Q. Mr. Hutchinson, and you got that so-called fee land in the condemnation suit, 200 or more acres?

A. I had nothing to do with the condemnation suit, Mr. Maury.

Q. Well you know that to be a fact that 200 or more acres was obtained in the condemnation suit, don't you?

A. Only through hearsay. I have had nothing to do with condemnation.

Mr. Maury: That is all.

Redirect Examination

By Mr. McKevitt:

Q. You said you didn't know about this condemnation?

A. Nothing but hearsay. I understand a condemnation suit is either pending or been decided.

Mr. McKevitt: That is all.

Mr. Maury: That is all. [332]

Mr. McKevitt: This exhibit marked Plaintiff's

(Testimony of Arthur S. Hutchinson.)

Exhibit No. 25, is that admitted into evidence? Have you offered it, Mr. Maury. I want to be certain of that.

Mr. Maury: I don't think there is any need to offer it. Certain sections were read from it. We object to it as tending to encumber the record, and to attempt to explain the contents of a written instrument by negotiations that were prior to it and all deemed intermerged and when the written instrument is not put in issue in the pleadings.

Mr. McKevitt: Your Honor, we have been talking a lot about the instrument; it was used by the plaintiff.

The Court: Yes, it shows the hours and days of the discussion and preparation that occurred before the final makeup of this agreement that the suit is about. I think that is a part of it. They talked that over and talked it all over before they executed the agreement, the lease. It might have some bearing inasmuch as there has been considerable testimony concerning it. I don't see any objection to allowing it to go in evidence.

Mr. McKevitt: Just to be straight, Mr. Maury didn't offer it and I am offering it, so we better change the suggested designation of it.

The Court: All right, let it go in subject to objection of counsel.

Mr. McKevitt: Will you have the record show, Mr. [333] Reporter, what has been previously re-

(Testimony of Arthur S. Hutchinson.)

ferred to as Plaintiff's Exhibit No. 25 is actually Defendant's Exhibit No. 25 officially in the record.

The Court: Very well.

Whereupon said Defendant's Exhibit No. 25, being Mining Lease, dated June 21, 1941, offered and received in evidence, is a part of this record.

(Defendant's Exhibit No. 25 is not typewritten into this record for the reason that photostatic copies of said exhibit would furnish a more accurate and complete description of same, and such photostatic copies could be furnished by counsel.) [334]

ROBERT BURGO

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lamb:

Q. Your name is Robert Burgo?

A. That is right.

Q. And you are the Chief Clerk in the Land Office of the Department of Interior at Billings, Montana, is that correct?

A. That is right.

Q. And as such you have charge of the official records in the Land Office?

A. Yes.

Q. As Chief Clerk?

A. Yes.

Q. I will show you an instrument marked De-

(Testimony of Robert Burgo.)

fendant's Exhibit No. 26, and ask you if this is a certified true and correct copy of records which are maintained in your office and which you have official custody thereof? A. It is.

Mr. Lamb: At this time we offer Defendant's Exhibit No. 26 in evidence.

Mr. Maury: We object to the introduction of the exhibit in evidence for the reason that it is not permitted [335] in Montana for a tenant to in any wise impeach the landlord's title after the tenant has once taken possession of the land under the lease. That the action is upon a written lease which has not been put in issue in the pleadings but which has been admitted. The evidence conclusively shows that the tenant did take possession under it and maintained possession under it, and that the present tenant is by the same under the same liabilities and duties by Act of Congress as the original tenant, the Metals Reserve Company. And, further, that in this very lease there are statements that the lessee would defend and sustain the title to any property that was not held by patent but that was held by location and that this property was held, it shows was held by location and——

Mr. Lamb: What paragraph is that, Mr. Maury?

Mr. Maury: I will get them for you and I will show you. 15 is one of the places. "Upon the termination of this Lease by either party, Lessee shall

(Testimony of Robert Burgo.)

surrender peaceable the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met,"

Mr. Maury: That is one of the places that they promised to maintain the possessory claims, but that is not at all necessary. There are two other places. Now in para-12; the Lessee agrees that it will defend the said leased [336] property. In paragraph 13 the Lessee says: "and Lessee shall, nevertheless, make and comply with all obligations and payment for the maintenance of the demised premises and possessory rights, claims and permits up to the said time of re-entry by Lessors," In three places in this lease but regardless of that that is not the law.

The Court: What is this exhibit?

Mr. Lamb: Your Honor, if you please, this is the decision of the Department of Interior acting under the Secretary of Interior determining the legality of the Lake Placer claim on which this particular townsite and these buildings are situated. As the court well knows, you can pull one or two words out of a paragraph and create any contention you might desire in some of the references. And in defending our references to mechanics *lines* that may be fixed against the property and so on this

(Testimony of Robert Burgo.)

particular decree or decision of the Secretary of Interior——

Mr. Maury: It is not a decision of the Secretary of Interior.

Mr. Lamb: Just a moment, Mr. Maury. You may have any answer to this when I finish. This decree or decision of the Land Office of the Department of Interior is offered in connection with the question as it relates to the value of the property to the plaintiffs insofar as the alleged dates which have been attempted to be proved here for the holding over by the War Assets Administration and the Reconstruction Finance Corporation. That is one particular issue that was put in by the plaintiffs themselves to which we are entitled to——

The Court: In what respect does this decree have any bearing on value as shown here in this case?

Mr. Lamb: Your Honor, this particular decree shows there was invalid entry by Mr. Mouat on this particular claim and that at no time did he have any title or interest in this particular claim because of illegal entry or improper application.

The Court: Does it make any reference to any buildings or structures erected on that property? Is that what you mean by showing no value or less value?

Mr. Lamb: Well apparently an attempt has been made to secure judgment for damages for holding

(Testimony of Robert Burgo.)

over. Now if Mr. Mouat has no title nor interest in this particular property, the defendant in the case is an agency in this particular case and the fee title in the Lake Placer claim has been in the United States of America throughout and, in fact, the United States, the Metals Reserve, which is also an agency of the United States, also secured a forest permit from the Forestry Department for this particular claim, and inasmuch as the original entry itself is found insufficient in this particular case, we couldn't be guilty of trespass and [338] removing any of the property, the buildings upon that particular property.

The Court: Are any of the buildings on that particular property?

Mr. Lamb: Yes, your Honor, it is this particular townsite, the Lake Placer claim that has been determined in that particular hearing as illegal and improper entry. That it was entry he had no right, no proper findings to ever make an application for a mining claim on that particular area, and the United States of America at all times has held the fee title, and this particular decision will revert back to his original entry to this particular proceedings.

The Court: It has a bearing on this piece of property?

Mr. Lamb: Yes, your Honor, it is this particular piece right here.

(Testimony of Robert Burgo.)

The Court: I haven't got time to read the thing through now. I don't know what the purport of it might be. I am not going to stop to read it but we will receive it subject to the objection of counsel. I will not turn it down entirely or accept it either, but receive it subject to objection and I will read it over some time in the future.

Mr. Lamb: Yes, your Honor.

Mr. Maury: Well we make the further objection that that isn't final; that there is still twenty some days [339] in which to appeal to a higher officer of the Land Office, and we state that that appeal will certainly be taken.

The Court: That is an entirely different phase of it.

Mr. Maury: Yes.

The Court: That appeal is in the process of being taken? You have time to appeal?

Mr. Maury: Yes, the time to appeal has by no means expired and that appeal will certainly be taken and in time.

(Whereupon said Defendant's Exhibit No. 26, offered and received in evidence, is a part of this record and is in words and figures as follows, to-wit:) [340]

DEFENDANT'S EXHIBIT NO. 26

United States

Department of the Interior

Before Acting Manager, District Land Office, Billings, Montana

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. W. MOUAT, ET AL,

Defendants.

Involving Lake Placer Mining Claim, Contest No. 1508, Billings 2120791.

Decision

November 5, 1947

Hearing Before The Acting Land Manager Held June 24 to June 26 Inclusive.

Witnesses testifying for the Government:

Mr. Walter H. Koch, Mining Engineer and Field Examiner for the Bureau of Land Management.

Mr. Hugh Nicely, Mining Engineer, employed at the MOUAT Mine since April, 1942; first, as Mine Foreman, then as Mining Engineer for the Reconstruction Finance Corporation, and afterwards maintenance engineer for the War Assets Administration.

Mr. Charles Buck, one of the original locators of the Lake Placer Claim.

Witnesses testifying for the Defendants:.

Defendant's Exhibit No. 26—(Continued)

Mr. Edgar J. Strasburger, Civil & Mining Engineer.

Mr. Malcolm W. Mouat, prospector and agent for the group of locators. [341]

Mrs. May Paula Mouat, wife of Malcolm W. Mouat, and one of the locators.

Mr. A. H. Dahle, specialist in mining, milling and construction of milling plants, Quartz Lode Mining and general mining.

Mr. Verner A. Gilles, Civil & Mining Engineer.

The taking of testimony took up all of the three days, June 24, 25, and 26, much of it being, in my opinion, immaterial and irrelevant to the question at issue—that of proving valuable mineral discovery, etc. Mr. Caplin, counsel for the Government, raised many objections; however, in accordance with the rules of practice, the objections were noted and the questions and answers were allowed to go on the records, so that defendants can have no complaints about evidence being suppressed which they considered valuable.

The records consist of 258 pages of transcribed testimony in addition to exhibits consisting of ore samples, certificate of assayers, map, plats and copy of agreement and lease between May Paula Mouat and M. W. Mouat, wife and husband, May Paula Mouat, as trustee parties of the first part. Edward Sampson, party of the second part, and Metals Reserve Company; after the taking of testimony, Mr. Maury, counsel for defendant, requested 30 days

Defendant's Exhibit No. 26—(Continued)

after receiving the transcribed testimony to make a brief, and Mr. Caplin, counsel for the Government, agreed to this with the stipulation that he would have 20 days to reply to Mr. Maury's brief.

Owing to the shortage of competent stenographers and the low remuneration paid for taking and transcribing testimony, it is very hard to get anyone to take on this work, however, we were very fortunate in securing the services of Mrs. Gladys Huntington for the job. Mrs. Huntington has made an excellent job of this very difficult and complicated work. She told us that owing to her other duties and obligations, it would take some time to transcribe the testimony. This took about six weeks and with the extensions of time granted for making briefs has caused considerable delay.

After the briefs had all been submitted, Mr. Maury requested permission to submit additional evidence. This has been treated as a request for a rehearing. In addition to the above, our office for the past month has been swamped with Oil and Gas lease applications and checkers seeking oil lands, taking up the most of our time, so that I have to consider this case mostly on non-work days.

Mr. Koch testified that he had found no evidence of Placer mining operations on the claim. He had spotted the location of the discovery cut and the corners of the claim from the location notice as given in the notice of location recorded in the

Defendant's Exhibit No. 26—(Continued)
county records, and from a map supplied by Mr. Hugh Nicely, who accompanied him in his examination of the claim.

Mr. Nicely was the Supervising Engineer for the War Assets Administration in charge of the chrome properties operated by [343] the Reconstruction Finance Corp. on the Stillwater River, Montana. Along with Mr. Nicely, he had a bulldozer excavate a cut 50 feet long, 12 feet wide, and 7 feet deep in the center, tapering off to zero towards both ends. The reason for making the cut 7 feet deep was because in the location notice, it was claimed the discovery cut was 5 x 7 feet and 10 feet long. It did not state whether the 5 feet was depth or width so to play safe, they made the excavation 7 feet deep.

This excavation was made about 50 feet north of where they had spotted the location of the discovery should be, as the slope at that point was too steep for a bulldozer to work on. He took two samples from the deepest part of the cut and panned them and found there were no heavy minerals in them—no gold, no black sand, and no chromite. In his complete examination of the claim, he did not find any evidence of valuable minerals which could be called discovery sufficient to warrant a prudent person in expending money for development of claim, and there is no difference from a mineral standpoint, between the mineral character of the original location, the first amended and the second amended location.

Defendant's Exhibit No. 26—(Continued)

In his cross-examination of Mr. Koch, Mr. Maury, chief counsel for Mr. Mouat, took up considerable time in propounding questions regarding the values and amounts of different claims. Mr. Caplin, counsel, for the Government, objected to many of the questions as irrelevant and having nothing to do with [344] proving discovery on the Placer Claim. However, in accordance with the Rules of Practice, these objections were noted and the questions and answers allowed to go on the records.

Mr. Koch stated that during the war chrome ore from the adjacent Lode claims was processed, the chromite ore removed and the so called tailings discarded, which contained olivine and serpentine, from which the magnesium could have been recovered. This was at a time when there was an enormous demand for magnesium and large plants were built by the Government at enormous expense. The Government operations and many private operations are now closed down.

Mr. Charles Buck testified that he was one of the original locators of the claim and that he had become a locator on the claim at the request or suggestion of Mr. Mouat, as remuneration for some work he had done on the claim, primarily prospect work and the digging of a small pit about 3 or 4 feet deep and about 3 x 3. He had made no other excavations on the claim.

On February 2, 1942, he gave a quit claim deed

Defendant's Exhibit No. 26—(Continued)
to Mr. Mouat for the claim, and after giving the quit claim deed, Mr. Mouat mentioned that his part was through. Mr. Mouat had given him \$25.00 which Mouat assumed to be the value of the time that he, Buck, had put on the claim. Subsequent to that, he had no interest in the claim.

There was no written agreement with Mr. Mouat or May Paula Mouat that Mrs. Mouat was to act as trustee, nor had he any [345] knowledge of verbal understanding. He could not recall authorizing anyone to use his name on the second amended location made on April 17, 1946.

On cross-examination by Mr. Maury. Mr. Buck repeated he had been given \$25.00 as a consideration for signing the deed, that he had no promise of a further interest in it, but he understood from Mr. Mouat that after everything was completed, he would have an interest coming back.

On page 189 of the transcribed testimony, lines 4 to 9, the following question was put to Mr. Mouat:

Q. "Do you consider that you or Mrs. Mouat are now the sole owners of the Lake Placer Claims?"

A. "No, sir. We did, however, buy up this man, Charles L. Buck. I looked at a deed today. I have the original deed here that he put in with Senator Myers, but as I recall it, we had a deed buying him out."

This, in my opinion, substantiates Mr. Buck's testimony that at the time he had given the quit

Defendant's Exhibit No. 26—(Continued)
claim deed after receiving \$25.00 for same that Mr. Mouat had stated that he was through.

In response to further questioning, Mr. Buck testified that they had dug up between 20 and 30 pieces of chromite ore from the discovery hole about the size of Exhibit "E", which is about the size of a man's fist.

Mr. High Nicely testified he had been employed at the Mouat [346] Mine since April, 1942, first as Mine Foreman at the mine until January, 1944, then as engineer for the Reconstruction Finance Corporation, and afterwards as maintenance engineer for the War Assets Administration. The buildings on the properties were all placed prior to the second amended application and the effect of the second amended application was to encompass all the buildings on the properties. He had not observed any mining operations on the Lake Placer, exclusive of the tunnels which go into the other Lode Claims, nor had he seen any signs or evidence of previous mineral development. In putting the houses and buildings on the Lake Placer claim, the whole camp was a checkerboard of sewer and water lines. Excavations for those lines were about 5 feet deep and nowhere in these excavations had he seen anything, which, based on his experience as a mining engineer, he would consider a valuable discovery. It was his personal opinion that a prudent man would not be justified in spending time and money

Defendant's Exhibit No. 26—(Continued)
and effort in the hope of developing a paying mine of it.

Mr. Strasburger testified to making two visits to the claim, the first about three weeks ago and the second the Saturday and Sunday previous to the hearing. He had gone over the claim and taken samples of ore and had assays made, which were placed on the records as exhibits and identified. Mr. Strasburger did not give an opinion as to whether a prudent man would be justified in spending time and money and effort in [347] the hope of developing a paying mine of it.

Mr. Malcolm W. Mouat testified that he had been a prospector for 50 years and had lived near the Lake Placer for 30 years. He had taken many samples himself from the Lake Placer which would run 28 percent magnesia, in addition to chrome and other minerals. He had been present when Mr. Strasburger had taken his samples. Mr. Mouat stated there are millions on tons of ore on the Lake Placer and other claims containing chrome, olivine, nickel and copper, and dwelt at great length on the amounts and values of these minerals. He states he could operate the Lake Placer by hydraulic pressure from the nearby streams at a cost low enough to make it profitable, mainly in the production of magnesium and the manufacture of fertilizers. He told of his activities in the region, and of losing \$90,000 in prospecting and developing his claims.

Mr. Dahle testified to being a Specialist most in

Defendant's Exhibit No. 26—(Continued)

milling and construction of millings and construction plants, quartz lode minings, and general mining. He visited and examined the Lake Placer for four or five days, November, 1946, in the company of Mr. Mouat. He had taken two samples of magnesium bearing rock and sent them to the assayers, Mr. Mouat had told him to send them to, but did not know what had become of them. In the course of 30 years, he had examined at least 2,000 claims. At the conclusion of his testimony, Mr. Dahle was asked the following question by Mr. Maury: (See Page 211) [348]

Q. "Taking all of the factors that you found present there into consideration, what have you to say as to whether that deposit of magnesium bearing rock, which you saw, is such as would justify a reasonable man in the expenditure of money with the expectation of making a commercially valuable and profitable property."

A. "I am not sufficiently up on chemical formulas for this sort of work, therefore, I feel that I cannot intelligently answer it."

Mrs. May Paul Mouat testified to being trustee for the locators of the claim, but in matters pertaining to the claim she had left everything to Mr. Mouat.

Mr. Gilles testified that he had never visited the Lake Placer claim but had read very extensively of the ores to be found in the Beartooth region. His testimony consisted mainly in describing the values

Defendant's Exhibit No. 26—(Continued)
of the factors needed in the production of magnesium and fertilizers.

The records show that the second amended location was made April 17, 1946 by Mrs. May Paula Mouat, acting as trustee for the original locators. Exhibits by the Government counsel show that the original locators quit-claimed all their interests in the claim between the dates October 31, 1941 to April 2, 1942.

The brief submitted by defendants is mostly a repetition of much of the evidence and assertion of the rights of the [349] locators to make the second amended location.

The brief submitted by counsel for the Government is a rebuttal of the arguments contained in the brief submitted by defendants and that they had no right to make the second amended location in the name of the original locators.

After hearing and reviewing the testimony in this case, I have come to the following findings and conclusions:

There is some conflict as to the location of the discovery cut. At the place where Mr. Koch made his excavation, he did not find any minerals, but according to Mr. Strasburger's testimony, it was very close to the discovery cut from which Mr. Buck testified he had dug up between 20 and 30 pieces of ore, some about the size of a man's fist, Exhibit "E". I weighed this exhibit and it weighed about 2 lbs. 4 oz., so that the amount of ore found

Defendant's Exhibit No. 26—(Continued)

by Mr. Buck would not amount to more than 50 pounds. This seems an infinitesimal amount for the size of the cut and the amount of labor expended in getting it out.

There is no conclusive evidence of the depth and amount of the wash or the amount and values of the ores in the wash which would be involved in the Placer operations.

Mr. Mouat has held a large number of lode claims in the vicinity of the Lake Placer for 30 years or more, so that it would seem as if he considered the lode claims richer and more valuable than the Lake Placer which was not located until 1940. [350] It was not found profitable to operate these claims, in competition with other and more richer sources of chrome.

It was only after the regular supplies of chrome were cut off that the Government found it necessary to get chrome from the Mouat and Benbow mines, regardless of cost. The Government expended a vast amount of money in the development of the mines and mills and houses for workers built on the Lake Placer location and all built before the second amended location. We would all have liked to see the Government continue the operation of the mines. However, just as soon as the supply of other chrome was restored, the Mouat mines were closed down and have remained closed down. In the course of the milling process, the chromite mineral was removed and so called tailings, which were discarded,

Defendant's Exhibit No. 26—(Continued)
contained olivine and serpentine, which could have been used for the production of magnesium. Here the Government threw away a product which was mined and milled at no cost from the standpoint of the magnesium because the chromite was paying for the millings and obtained magnesium from other plants they had built for the production of magnesium. Then there was a much better demand for magnesium than there is today or will be under ordinary peace conditions. Since the war ended, all of the large government plants for the production of magnesium have closed down as well as many private plants.

The piece of magnesium metal shown as Exhibit "D" was not made from any mineral from the Lake Placer region. [351]

As a result of the shutdown of the mines, the Government was left with a large townsite of many fine homes which had been erected at great cost, as well as mining equipment, mills, and large dumps of ore. The buildings and equipment which the Government has been able to dispose of have been transported elsewhere.

From the evidence submitted, it is my opinion that Mrs. May Paula Mouat was without authority to act as trustee for the original locators in making the second amended location as they had quit-claimed all their interest between the dates of October 31, 1941 and April 2, 1942.

Defendant's Exhibit No. 26—(Continued)

On the question of "Whether discovery was such as would justify a prudent man in spending time, money and effort on the Lake Placer claim in the hope of developing a paying property," Mr. Mouat contended it was, Mr. Strasburger did not give any opinion, Mr. Gilles had not examined the claim, Mr. Dahle stated he was not sufficiently up on chemical formulas for this sort of work to intelligently answer, and Mr. Koch and Mr. Nicely stated it was not.

The preponderance of opinion among the expert mining men and engineers in this case is "that a prudent man would not be justified in spending time, money and effort in the hope of developing a paying mine, and I so decide.

Acting Manager

/s/ WILLIAM RIDDELL,

Acting Manager

District Land Office

Billings, Montana

November 5, 1947. [352]

In the matter of a request October 2 by defendants to submit additional evidence which they could not have knowledge of previously, and before decision was reached on the original evidence, I have treated this as a request of rehearing. The evidence submitted is merely cumulative and asserts that Mr. Koch did not go deep enough in the excavation he made and that he would have to go to a depth of

Defendant's Exhibit No. 26—(Continued)
16 feet before he would have got any discovery. There is no proof that if the cut had been dug to 16 feet, ore would have been discovered, or if it had, that it would be more valuable than that in the discovery cut claimed by defendants, or of any of the samples taken from the claim and exhibited by defendants. The request for rehearing is therefore denied.

/s/ WILLIAM RIDDELL,
Acting Manager,
District Land Office,
Billings, Montana.
November 5, 1947.

I hereby certify that the above and foregoing is a true, correct, and complete copy of the decision rendered by me, as Acting Manager of the United States District Land Office, Billings, Montana, on November 5, 1947.

/s/ WILLIAM RIDDELL,
William Riddell,
Acting Manager.
November 12, 1947. [353]

ARTHUR A. JOHNSON

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lamb:

Q. Your name is Arthur A. Johnson?

A. That is right.

(Testimony of Arthur A. Johnson.)

Q. And you are Administrative Assistant of the Office of the United States Forest Service, Custer National Forest, under the Department of Agriculture, is that correct? A. Yes, sir.

Q. And as such do you have official custody and control of the records of the, as pertain to the Custer National Forest and under the United States Forest Service? A. Yes, in this office.

Q. I will show you an instrument marked Defendant's Exhibit No. 27 and ask you if this is one of the records maintained in your office of which you have official custody? A. It is.

Mr. Lamb: At this time we will offer in evidence Defendant's Exhibit No. 27. And for the information of the court it is a Special Use Permit granted by the Forest Service for this same townsite, and I feel that it is about on the same basis as this previous exhibit that is introduced.

Mr. Maury: We object to the introduction of this [354] instrument as being an attempt by the lessee and its legal successor to impeach the title of the landlord under the lease which has not been put in issue, and also that it is a well known fact or law rather that this forest reservation when erected reserved to all persons who wanted to enter that reservation for the purpose of mining and milling and location of mining claims a right to do so; that that is in all forest reservation enactments, and in the papers erecting the forest reservations in Montana, and that this special use permit is too indefi-

(Testimony of Arthur A. Johnson.)

nite to be held to apply to this particular placer location, and that this is one of the things that the lessee promised to sustain.

The Court: What does this purport to do?

Mr. Maury: It purports to give to the Defense Plant Corporation the right to use National Forest Lands in Sections 20 and 21, T. 5 S., R. 15 E. for the construction and maintenance of the following improvements, occupancy and development for the following purpose, subject to the conditions stated below, and then there is vast data of the land described by section, township and range.

The Court: Covers several hundred acres, is that it?

Mr. Maury: I presume so, Your Honor. I suppose it covers more than several hundred acres but I don't know without checking it. [355]

The Court: What is the purpose of it? What is your idea about this exhibit?

Mr. Lamb: This here is about on the same basis as this previous one.

The Court: Well let's dispose of it by receiving it subject to the same objection because they both go together.

Mr. Maury: We except.

Mr. L

(Whereupon said Defendant's Exhibit No. 27, Special Use Permit, offered and received in evidence, is a part of this record, and is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 27

U

USES—Custer

Defense Plant Corporation

Mining Development (Mouat Properties)

2/16/42

SPECIAL USES PERMIT

Permission is hereby granted to the Defense Plant Corporation, a Federal Government Corporation, of Washington, D. C., to use National Forest lands in Sections 20 and 21, T. 5 S., R. 15 E., for the construction and maintenance of the following improvements, or occupancy and development for the following purposes, subject to the conditions stated below:

1. Tunnel site area, including ore bins, crushing plant, tram terminal and other works or structures necessary in connection with the construction or maintenance of the same; said structures to be located upon an area of from five to ten acres near the center of the NW Quarter of Unsurveyed Sec. 20, T. 5 S., R. 15 E., upon land now included in unpatented mining claims and upon about one acre of what now appears to be unclaimed National Forest land;

2. Mine yard, including shops, supplementary buildings and structures, road connections, etc., as may be necessary or desirable for the best lay-out and development of the mine yard; said mine yard

Defendant's Exhibit No. 27—(Continued)

and supplementary structures to be located on an area of up to 11 acres located mostly in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of unsurveyed Section 20, T. 5 S., R. 15 E., upon land now included in unpatented mining claims and upon about nine acres which now [357] appears to be unclaimed National Forest land;

3. Mine campsite, including all necessary structures, of a permanent or temporary character, for housing employees, mess facilities, shops, recreation room infirmary, warehouses, offices, water system, garbage and sewage disposal systems, light, power and telephone distribution systems, streets or paths, road connections, and other structures or facilities necessary for the development of the area as a mine campsite; said mine campsite to be located on an area of approximately 60 acres, located mostly in the NE $\frac{1}{4}$ of Sec. 20, T. 5 S., R. 15 E., upon lands now included in unpatented mining claims and upon about 20 acres which now appears to be unclaimed National Forest land;

4. Service landing area, including loading platforms, warehouses, supplementary buildings, road connections, and other facilities necessary for expediting and maintaining freight traffic to the mine campsite, mine yard and tunnel site area; said structures and facilities to be located on an area of approximately 10 acres mostly in the SW $\frac{1}{4}$ of Sec. 21, T. 5 S., R. 15 E., upon lands which are now included in unpatented mining claims and, depend-

Defendant's Exhibit No. 27—(Continued)
ing upon the final location selected for this service area, upon National Forest lands;

5. Mill site area, including an ore concentrating mill, tram terminal and facilities, crushing plant, ore conveyor, warehouses, shops, offices, garages, tailing disposal dumps, [358] stock piles, residences and housing facilities for men employed in connection with the mining, milling or trucking operations, and necessary or desirable subsidiary structures or facilities including roads and road connections, streets, paths, water system, garbage and sewage disposal systems, power, light, and telephone line distribution systems; said structures and facilities to be located in an area of approximately 100 acres (of which about 25 acres now appears to be unclaimed National Forest land) in the center of Section 21, T. 5 S., R. 15 E;

6. Aerial tramway, consisting of steel towers, cable and buckets, and including necessary terminal facilities at either end, extending a distance of approximately 6470 feet on a bearing of approximately N 81°30' W from a point on the mill site area at about the center of Section 21, T. 5 S., R. 15 E., to a point on the tunnel site area in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of unsurveyed Section 20, T. 5 S., R. 15 E., across lands now included in unpatented mining claims, and across approximately 250 feet of National Forest lands;

7. Other facilities necessary or desirable in connection with the mining development, not mentioned

Defendant's Exhibit No. 27—(Continued)
above and not included in other special use permits, such as pipe lines for water or air, signal systems, etc.;

Conditions under which this permit is issued:

1. This permit is issued free of charge in accordance with Regulation L-2-B. [359]

2. The permittee shall comply with the regulations of the Secretary of Agriculture governing the National Forests.

3. This permit is subject to all valid claims. It is issued with the understanding that the permittee has secured or will secure the consent of any person having valid claim to any of the lands authorized to be occupied hereunder. However, the permittee and the Forest Service hereby mutually agree that if any unpatented mining claim covering lands authorized to be occupied by this permit is, in due course of law or regulation, declared or proven to be not valid when the occupancy or use authorized by this permit shall automatically have full force and effect as though the land had not been covered by the unpatented mining claim at the time of issuance of this permit.

4. The permittee shall fully repair all damage, other than ordinary wear and tear, to roads and trails in the National Forests caused by the permittee in the exercise of the privilege granted by this permit.

Defendant's Exhibit No. 27—(Continued)

5. Construction work (or occupancy and use) under this permit shall begin within 6 months, be completed within 2 years from the date of the permit, and this use shall be actually exercised at least 180 days each year, unless the time is extended or shortened.

6. In case of change of address, permittee shall immediately notify the Forest Supervisor.

7. No National Forest timber may be cut or destroyed [360] without first obtaining a permit from the Forest Ranger, except as hereinafter provided, and except as provision for removal of National Forest timber may be incorporated in sale permits or administrative use permits heretofore or hereafter issued to the permittee.

8. This permit may be transferred with the approval of the officer by whom it was given or his successor, subject to such conditions as may be imposed at the time of transfer. It shall terminate upon breach of any of the conditions herein or at the discretion of the Regional Forester or the Forester.

9. The permittee shall provide, whenever requested by the Forest officers, a way across the land covered by this permit for the free ingress or egress of Forest Officers and for users of National Forest land.

Defendant's Exhibit No. 27—(Continued)

10. The permittee shall require its operating agent or agents and all contractors or subcontractors to agree to pay the United States for any damage to property under the direct jurisdiction of the United States Department of Agriculture Forest Service resulting from this use.

11. Debris resulting from clearing operations in connection with preparatory work, construction or maintenance of any of the structures or facilities authorized herein will be disposed of in accordance with directions from the Forest Ranger; provided that no burning will be done during periods of high fire danger, or during the closed season, without written permission from him. [361]

12. The permittee agrees to observe and comply with all State laws and county ordinances concerning sanitation and the protection of health which are effective within the area covered by this permit; to adopt all necessary precautions to prevent pollution of the waters of streams or springs; to construct any outside toilets which become necessary in approved fly-proof manner and to maintain them in good sanitary condition; and to burn, bury, or otherwise adequately dispose of all garbage, refuse, debris, cans, etc., resulting from this occupancy of the land. The permittee further agrees to drain and clean septic tanks at periodic intervals, and, if requested to do so by the Forest Supervisor, on the advice of either the State Board of Health or

Defendant's Exhibit No. 27—(Continued)

a qualified engineer of the Forest Service, to construct and maintain satisfactory filter lines for disposal fields below any septic tanks or make other reasonable and justified additions or improvements to the sewage disposal systems. If a nuisance develops because of the method of disposing of tailings from the mill, either from the pollution of waters or adverse effect upon the health or livelihood of persons resident down-stream from the mill within a reasonable distance, and not to exceed 25 miles, the permittee agrees to adopt such precautions or make such changes in the method of disposing of tailings as may be recommended by competent authority and requested by either the Forest Supervisor or the State Board of Health. [362]

13. The permittee agrees to keep the premises in a neat and orderly condition (particularly with respect to the camp area) and to maintain structures and facilities in a safe condition.

14. No water rights accrue under this permit.

15. It is hereby mutually agreed between the permittee and the Forest Service that the permittee may make such provision as seems desirable and expedient, by contract, sub-contract, or other means, for the furnishing of meals, for supplying commissary facilities, for supplying laundry and janitor service, for selling articles of food, clothing, gasoline, oil, and other consumer goods necessary or desirable for providing residents of the various

Defendant's Exhibit No. 27—(Continued)

areas authorized to be occupied with necessities or conveniences of life; and such use of the National Forest lands involved will not be considered a "commercial" use as that term is construed in the interpretation of the Forest Service special use regulations; provided: no alcoholic beverages, including beer, will be sold on the premises; provided further: the permittee will own, or control through appropriate contract, the building or buildings where the furnishing of such services or the selling of such articles takes place; and the permittee will itself be responsible for determining the kind or type of goods or services to be sold or furnished under the provisions of this clause, and will be responsible for the manner in which any business operating under the provisions of this clause is conducted. The Forest Service reserves the right to protest [363] any rates charged for services rendered or goods sold which appear too high in comparison with competitive rates prevailing for comparable goods or services sold at other places plus an allowance for the cost of transportation to the place where such goods or services are disposed of; and in the event of persistently flagrant violations of this price policy to withdraw its recognition of the mutual agreement contained in this clause with respect to the article or articles subject to such persistent violation.

16. The permittee agrees to furnish the Forest Supervisor with general lay-out plans of the tunnel site area, mine yard, mine campsite area, service

Defendant's Exhibit No. 27—(Continued)

landing area, mill site area, and for any other developments which have a bearing on National Forest administration, and also any maps prepared under its direction showing the location of patented or unpatented mining claims in the vicinity.

17. With respect to the mine campsite area, the permittee agrees to hold clearing to that which is necessary for placing or utilizing structures, or clearing rights-of-way for structures or facilities. The permittee further agrees to make provision in the lay-out plan for this area for all of the housing needs that can reasonably be anticipated; and if it will not be possible to provide permanent or semi-permanent structures, either bunkhouses or family dwellings, for all employees that will need to be housed on the mine camp area, to make satisfactory provision [364] for either temporary camping area or trailer camps to take care of the excess. Any such temporary camps or trailer camps will be located only on the mine camp area (except with the prior approval of the Forest Ranger) and will be under the control and supervision of the permittee. The permittee hereby agrees to assume responsibility for seeing that the following minimum conditions are met in the lay-out and occupancy of any such temporary camping or trailer camp areas:

(a) the entire area has an adequate supply of pure water;

(b) the camp lay-out is planned and streets are cleared before any occupants move onto the area;

Defendant's Exhibit No. 27—(Continued)

(c) living quarters are at least 100 feet from running water and are not crowded together;

(d) the occupants make adequate provision for fly-proof toilets and garbage pits located at a safe distance from a sanitary point of view and not less than 100 feet from running water and 50 feet from living quarters.

The permittee agrees to accept responsibility for general supervision over such temporary camps, to see that the minimum requirements are adhered to, and to see that upon abandonment of the temporary camp all structures are removed and the area cleaned up to the satisfaction of the Forest Supervisor. The Forest Service assumes no responsibility for any such temporary camps after they are established except for such occasional [365] inspections as may prove desirable for the purpose of seeing that the minimum requirements are being met.

18. The permittee hereby agrees to accept responsibility for making satisfactory arrangements for housing of its own employees, and for supervision over housing facilities and conditions of its contractors, employees of contractors, and employees of other Governmental agencies which may be requested or required to do work in the vicinity in connection with the mining development.

19. The permittee agrees that any dams constructed by it on the permit area will be subject to inspection by a competent Forest Service engineer with regard to safety features, including adequacy

Defendant's Exhibit No. 27—(Continued)
and design of spillways, adequacy and design of outlet structures, footings and method of abutting dam in side embankments; and the Forest Supervisor may require the permittee to submit plans showing such details of design before a dam is constructed.

20. The permittee agrees that to the extent it is economically practical to do so, all timber cut in the clearing of rights-of-way for the various structures and facilities authorized herein which can be used for mine timbers or other uses in connection with mining operations of the permittee on the so-called "Mouat Properties" will be skidded to a convenient decking point and decked there. The Forest Service agrees that any such decks of National Forest timber will be held for use as [366] mine timbers or other uses by the permittee as long as the permittee has a need for it, the disposal of such timber to the permittee to be in accordance with terms of any timber sale or administrative use agreements then in effect with the permittee.

21. The permittee shall clear and keep clear of all inflammable material whatever width of right-of-way is necessary for the operation of the tramway, but not to exceed 50 feet. The Forest Ranger shall be responsible for determining the adequacy of the clearing at any time with respect to fire control or the abatement of fire hazards.

22. The permittee agrees that the Forest Service may, free of charge, transport material over the

Defendant's Exhibit No. 27—(Continued)

tramway when such use by the Forest Service will not interfere with the mining operations of the permittee.

23. The permittee agrees, with respect to the tramway, to remove the cable, the tram buckets, and the towers, but not the tower foundations, at the termination of this permit or upon the abandonment of this use; provided that if this permit is terminated because of transfer of the use to some other agency or individual for the express purpose of continuing the use of the National Forest lands herein described for the purpose of which this permit is issued, then this clause shall not apply to the permittee named herein.

24. The permittee agrees that in the interest of good [367] administration, preserving order, and avoiding difficulties which might otherwise develop it will make the necessary arrangements to have a deputy sheriff available at or in the vicinity of its Mouat operations for the duration of this permit, or at least during the time that it is actively engaged in operations on the Mouat properties.

25. The permittee agrees that any conflict in area or terms between this permit and the provisions of three other special use permits which may hereafter be issued to other permittees for the construction and maintenance of a road, power distribution line and telephone line will be settled amicably between the permittee and such other permittee as

Defendant's Exhibit No. 27—(Continued)

may, by contract or other directive from the permittee, be requested or required to construct and/or maintain said road, power distribution line or telephone line. The Forest Service agrees not to object to overlapping in the use made of areas authorized to be occupied under the several permits provided that such overlapping occurs with the knowledge and consent of the permittee.

26. The Forest Supervisor may require marking on the ground the boundaries of the various "sites" herein authorized to be occupied.

27. The area herein authorized to be occupied in the various "sites" may be modified or extended according to the needs for the proper development of the mining properties; [368] provided, the permittee will seek the prior approval of the Forest Supervisor before making any substantial change in area or proposed use.

28. This permit may be amended or modified by a modification in letter form, which, after acceptance by the permittee and approval by the issuing officer, his designated representative, or successor, will be attached hereto and become a part hereof.

29. The permittee shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon request of officers of the

Defendant's Exhibit No. 27—(Continued)

Forest Service, or other agents of the United States, to prevent and suppress fires on or near the lands to be occupied under this permit.

30. In the interest of fire protection in the vicinity of the project works, the permittee hereby agrees to negotiate a cooperative fire protection agreement with the Forest Service, the agreement to be prepared by the Forest Service and to include applicable parts of the usual cooperative fire protection agreements, such as use of employees of the permittee for fire fighting purposes, their release, rates of pay, and responsibility of the permittee and the Forest Service in fighting forest fires in the vicinity of the property under the control of the permittee.

31. It is expressly understood that when the Metals Reserve [369] Company takes over the interest of the Federal Government in the development and/or operation of the chromium mining operations on the so-called Mouat properties in the Stillwater River drainage in Stillwater and Sweetgrass Counties, for which the Defense Plant Corporation is now responsible, the term "permittee" as used herein shall be construed to mean Metals Reserve Company instead of Defense Plant Corporation; and the obligations assumed hereunder by the permittee and by the Forest Service shall remain the same as if the permit had originally been issued to the Metals Reserve Company. But

Defendant's Exhibit No. 27—(Continued)

this construction of the word "permittee" shall apply only to the Metals Reserve Company; and the transfer of right, title, or interest in or to the structures or facilities for which this permit is issued to any other person, organization, or thing shall terminate this permit.

32. It is hereby mutually agreed that upon the termination of this permit, or upon the decision of the permittee to discontinue its interest in the mining operations referred to in Clause 31, the Forest Service and the permittee will confer upon the most satisfactory methods of disposing of the structures and facilities built upon the lands authorized to be occupied by this permit. If at that time the mining venture is to be continued by a person or organization other than the permittee, the Forest Service agrees that any such person or organization designated by the permittee shall receive first [370] consideration in the issuing of new special use permits covering the structures and facilities included in this permit, or other structures and facilities existing at that time but covered by separate special use permits the use or enjoyment of which is essential to the prosecution of the mining work. If no such further work is contemplated, the permittee and the Forest Service will decide upon a course of action to be followed, subject to any Acts of Congress or other statements of public policy regarding the disposition of property held by the permittee; and such course of action may provide that the

Defendant's Exhibit No. 27—(Continued)

permittee leave intact all, part or none of the structures or facilities herein above referred to and completely remove others, the decision as to which structures or facilities are to be left intact and which removed to be based on the effect of such action on the public welfare and the extent to which any structures or facilities left in place may be utilized in the future for some worthwhile or useful purpose.

33. In no event shall the United States Department of Agriculture Forest Service be held liable for damages occasioned to the property of others by the construction, maintenance or operation of the structures or facilities herein authorized, or any which may subsequently be authorized.

34. In the discretion of the Forest Supervisor, this permit may be considered a temporary permit, to be superseded in due course by another special use permit containing substantially [371] the same conditions but including more specific descriptions of the National Forest land to be occupied for the various uses herein authorized.

35. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified, and during his continuance in office, shall be admitted to any share or part of this agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend

Defendant's Exhibit No. 27—(Continued)
to any incorporated company where such agreement
is made for the general benefit of such incorpora-
tion or company (41 U.S.C., Sec. 22 and 18 U.S.C.,
Sec. 199). [372]

Recommended For Acceptance

Date: Apr. 18, 1942

ANACONDA COPPER
MINING COMPANY

By F. C. GAETHKE

Manager Chrome Operations

Accepted

Date: Apr. 18, 1942

DEFENSE PLANT
CORPORATION

By CECIL B. HILL

Supervising Engineer

Approved

Date: Apr. 21, 1942

W. J. LESSICK
Forest Supervisor

Accepted in transfer or assignment of interest
from the Defense Plant Corporation subject to all
the conditions set out above.

Date

METALS RESERVE
COMPANY

By

Title [373]

Mr. Lamb: The defense rests, your Honor.

REBUTTAL

Mr. Maury: Mrs. Mouat, take the stand.

MRS. MAY PAULA MOUAT

resumed the stand on rebuttal and testified as follows:

Direct Examination

By Mr. Maury:

Q. Mrs. Mouat, in the matter of this lease of December, 1941, did you have any conversations with Mr. John Norton about any buildings that were to be on the leased land or might be put on it?

A. No, sir.

Q. Did you have any conversations with Mr. Hutchinson about any buildings that might be put upon the land?

A. No, sir.

Q. Where was that lease signed by you? Where were you when you signed that lease?

A. At the house.

Q. Who were your attorneys in the matter?

A. Myers and Judge Goddard.

Q. That was ex-Senator Henry L. Myers?

A. Yes. [374]

Q. And Judge Goddard?

A. Yes.

Q. And did you trust to them about the lease?

A. Yes, I certainly did.

Q. And both of them are now dead?

A. Yes.

(Testimony of Mrs. May Paula Mouat.)

Q. Were you in bed on the forenoon of the day that lease was signed?

A. Until eleven o'clock.

Q. Until eleven o'clock, and why?

A. Well I had arthritis very bad and my husband came home at eleven and said I would have to get up and get lunch for those that were coming up.

Q. And they arrived? A. Yes, sir.

Q. A short time after that? A. Yes.

Q. And now what were you doing when they arrived?

A. Well rushing around getting the lunch.

Q. The circumstances connected with signing the lease, what were they? You can tell them in your own way.

A. Well they rushed me into the living room and didn't give me a chance to read the lease or anything. Mr. Hutchinson sat on one side of me and Mr. Mouat on the other, and they tried to read it to me because they were in a hurry they had [375] to try to get to Columbus or over to the Benbow, and then instead of hurrying after the lease was signed why they relaxed, they had lots of time.

Q. Did either of those gentlemen say anything to you there about any buildings that might be put on the land? A. No, sir.

Q. Or anything in that connection?

A. No, sir.

Mr. Maury: That is all.

(Testimony of Mrs. May Paula Mouat.)

Cross-Examination

By Mr McKevitt:

Q. Mrs. Mouat, you originally signed a first lease in June, 1941?

Mr. Maury: We object as not proper cross-examination.

The Court: Sustain the objection.

Q. (By Mr. McKevitt): I will refer you to Plaintiff's Exhibit No. 25 and ask you if you originally signed this?

Mr. Maury: Objected to as too remote and not proper cross-examination.

The Court: No, I don't think so unless you want to take this witness and make her your own. I will sustain the objection. [376]

Q. (By Mr. McKevitt): Mrs. Mouat, you were represented by attorneys at all times in this negotiation, weren't you?

A. Yes, sir, Senator Myers.

Q. You are the Trustee of an agreement whereby these mining claims have been transferred to you as Trustee?

Mr. Maury: Objected to as not proper rebuttal and testimony has been gone into.

Mr. McKevitt: It is perfectly proper; you are trying to show her interest.

The Court: What is the question?

Mr. McKevitt: I simply asked if she was a Trustee of the various mining claims located by Mr. Mouat and transferred to her as Trustee.

(Testimony of Mrs. May Paula Mouat.)

The Court: We have gone over that and that is in evidence.

Q. (By Mr. McKevitt): Did you yourself have anything to do with the negotiations, Mrs. Mouat?

A. No, I was sick in bed most of the time.

Q. The negotiations leading up to the transfer to you as Trustee?

Mr. Maury: We object as not proper rebuttal and has been gone into.

The Court: Sustain the objection.[377]

Q. As a matter of fact isn't this true, you read this instrument?

The Court: I will sustain the objection because the witness already stated she had her attorneys and she relied upon her attorneys for advice.

Q. Did you also rely upon your husband?

Mr. Maury: We object to it as calling for communication between husband and wife.

The Court: I will sustain the objection.

Mr. McKevitt: That is all.

Mr. Maury: That is all.

MALCOLM WILLIAM MOUAT

resumed the stand on rebuttal and testified as follows:

By Mr. Maury:

Q. Mr. Mouat, were you in court when Mr. John Norton testified? A. Yes, sir.

Q. Were you sitting up close where you could hear? A. Yes, sir.

Q. He said that there were certain conversations

(Testimony of Malcolm William Mouat.)

between you and himself prior to the signing of this lease about buildings that might be placed on the land; did any such conversation take place?

A. May I ask if it was the first or second lease?

Q. I am talking about the second lease, the one in December.

A. No conversations on that.

Q. Now was there any conversations between you and Mr. Hutchinson?

A. Not on buildings or houses or wooden structures.

Mr. Maury: That is all.

Cross-Examination

By Mr. Lamb:

Q. Mr. Mouat over how long a period of time did the negotiations go on before the actual lease was signed?

Mr. Maury: We object as not proper rebuttal, not proper cross-examination.

Mr. Lamb: Your Honor, he is asking whether or not there was any conversation with Mr. Norton and it relates to those conversations and merely preliminary question.

The Court: Well he said no. I suppose you could ask that question. Overrule the objection.

Q. How long did the negotiations continue before the lease was finally signed by you and Mrs. Mouat?

A. The second lease?

Q. How long did all of the negotiations go on?

A. Including the first lease? [379]

(Testimony of Malcolm William Mouat.)

Q. All the negotiations leading up to the final signing of the lease?

A. From roughly in May to the signing of that lease, I think December 17th. I can look in my notebook.

Q. No, that is approximate. And during that time did you have quite a number of different conversations with Mr. Norton pertaining to that lease?

The Court: Which lease?

Q. The lease which is signed, final lease?

A. Some letters transpired between us and later, that lease was signed this was later so I had no conversations. He was not out much.

Q. Did you have any conversations with Mr. Norton at any time between May and the actual signing of the lease?

A. First or second lease?

Q. Any conversation with Mr. Norton at any time between May and December?

A. Yes, we had conversations.

Q. All right, about how many?

Mr. Maury: We object as too remote and not proper rebuttal.

The Court: I think so. He said he had no conversations about the buildings. That is what he was interrogated about and you can ask him along that line, ask him in respect to that if you want. [380]

Mr. Lamb: That is all.

Mr. Maury: That is all. The plaintiffs rest.

Mr. Lamb: The defense rests, Your Honor.

Mr. Maury: If Your Honor please, I take it the court will want a copy of the record?

The Court: Yes.

Mr. Maury: And I take it that the court doesn't care for any oral argument and that it is better to have it all reduced to writing for the court to consider.

The Court: I think so. This is a complicated case here and a good many questions of law and we better have the testimony written up, and upon receipt of copies of the transcript how much time do you want for briefs?

Mr. Maury: Why we would want two weeks or less.

Mr. McKevitt: After the transcript——

Mr. Maury: After the transcript gets in our hands.

The Court: After receipt of the transcript.

Mr. Lamb: Your Honor, as far as the defendants are concerned our counsel is somewhat divided and will be assisting in writing of the brief and I think we will need a little more time than the usual thirty days.

The Court: Suppose you take thirty days on the side and if you hurry things up and get through before that [381] all well and good. If you take thirty days on the side and twenty days for reply, and if anything happens you think you require more time, apply to the court. There is a good deal of ground to cover.

Mr. Maury: Now as to expense we will stand half and the defendants half.

Mr. McKevitt: You mean as far as the transcript?

Mr. Maury: As far as the transcript, and that shall abide as costs of the case.

Mr. McKevitt: We will get into that later.

Mr. Maury: Now I want the court to suggest when the reporter gets to all these documents that have long certificates on them that when they are prepared, we especially said there was no objection to the certificates, you know, that they are true and correct, so that the reporter could just show in his notes duly certified so that there won't be any unmerciful encumbering of the record.

Mr. McKevitt: Your Honor, there is one other thing I notice the reporter was taking opening statements and ordinarily that isn't transcribed in the record.

Mr. Maury: No, he won't put in any of that.

The Court: No, it isn't necessary to put that in as part of the record, and there are a lot of exhibits he can refer to that will not be encumbered in the record. I can refer to those exhibits as long as they are kept together in [382] a separate box or package so they can be referred to.

Mr. Maury: We will get the record quicker that way. Your Honor, there is a rule we have to present findings within a certain time. We would like to present our findings within ten days after the record is given to us.

The Court: After the court's decision you present findings. The court in its discussion invites findings and conclusions.

Mr. Maury: Yes.

The Court: And I suppose the court can allow any time.

Mr. Maury: We would like ten days after the record is submitted to us.

The Court: Very well.

Mr. Maury: For the purpose of the record we ask at this time for the issuance of writ of restitution of the premises.

Mr. McKevitt: We oppose it, your Honor, because the Reconstruction Finance Corporation is being defendant here and the testimony definitely established anyone in possession, namely, the War Assets Administration, has already been dismissed as defendant in this suit.

The Court: Well we will have to see what we can do about it later on if we can do anything about it.

Mr. Maury: Yes. We were making our record.

The Court: I will adjourn court until tomorrow morning at 10:00 o'clock. [383]

In the District Court of the United States, in and
for the District of Montana, Billings Division

United States of America,
State of Montana—ss.

I, Sidney O. Smith, Official Court Reporter, in

the above-entitled court, do hereby certify that the foregoing annexed transcript is a true and correct record of the testimony and proceedings had in Civil Action No. 871, May Paula Mouat, et al., vs. Reconstruction Finance Corporation, et al.

Dated this 24th day of December, 1947.

/s/ SIDNEY O. SMITH,
Official Court Reporter.

[Endorsed]: Filed Dec. 24, 1947.

In the District Court of the United States, in and
for the District of Montana, Billings Division

Civil Action No. 871

MAY PAULA MOUAT and M. W. MOUAT, Wife
and Husband, and MAY PAULA MOUAT, as
Trustee of an Express Trust,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION and WAR ASSETS ADMINISTRA-
TION, an Agency of the United States of
America,

Defendants.

OPINION

This is an action for damages, alleging the breach of a written lease on the part of the defendant, the lessee, for failure to pay rent to the plaintiffs, the lessors therein; for damages for holding over; for

rent for holding over, and for damages for strip and waste, and failure to leave the property in good condition as provided in the covenants contained in the lease. The case was tried to the court without a jury, the transcript of the evidence made available to court and counsel and briefs for the respective parties were subsequently filed, and the case thereafter submitted to the court for decision.

The lease is extended and somewhat complicated, but in that respect not unlike many other contracts prepared for the Government, or agencies thereof, during the prevalence of war conditions. The lessors had title to some of the property embraced in the lease and to other property apparently only a possessory claim, but the lease was duly executed and the lessee occupied the property under the terms of the lease and conducted mining operations thereon. Some of the important questions involved relate to the amount of rent claimed by lessors and likewise the measure of damages for the destruction and removal of buildings placed upon the ground by the lessee.

The lease was entered into between plaintiffs and the Metals Reserve Corporation, which the Government owned and created by the Reconstruction Finance Corporation, and it appears that under the Act of June 30, 1945, 59 Stat. 310, the latter corporation succeeded to all the rights and liabilities of the former corporation. Plaintiffs claim minimum royalties for the years 1944, 1945, and two months of 1946, amounting in all to \$21,666.66.

About eighty homes and other buildings were constructed on land known as the Lake Placer Mining Claim. The buildings were occupied for the most part by the miners. The defendant challenges the interest of the lessors in the Lake Placer Claim and the right to lease the land included therein, and asserts its right to remove all buildings from this claim at the expiration or termination of the lease. The defendant contends that the parties to the lease at all times agreed, that townsites, such as the Lake Placer Claim constituted, would not come within the class of improvements which would pass to the plaintiffs upon the termination of the lease. In that connection the question is raised whether the term "wooden buildings" contained in paragraph 15 of the lease would include the wooden structures on the Lake Placer Claim. Defendant claims an ambiguity exists in the lease in that respect and asks the court to accept oral explanation by which it is contended that the term "wooden buildings" did not apply to those on the Lake Placer Claim, and were not to become the property of lessors upon the termination of the lease, and could therefore be disposed of by lessees as they saw fit.

From a consideration of the lease, the pleadings, evidence and briefs, the court concludes that the plaintiffs are entitled to judgment for immediate possession. The plaintiffs claim a minimum royalty due them until February 28th, 1946, in the sum of \$21,666.66, and the proof on the part of lessee, or lack of proof as to the exact time when opera-

tions by the lessee actually terminated would seem to require the allowance of this claim, when considered in connection with other pertinent circumstances.

It appears that on November 15th, 1945, the plaintiffs were notified in writing that the lease would expire on February 28th, 1946, but on the subject of the adjustment of royalty payments it would seem necessary to determine definitely when operations under the contract ceased, and since the lessee was in possession and control the burden would fall upon the defendant to establish this [387] fact. Plaintiffs assert that there is no order in the record to the defendant from any board or officer requiring a shut-down of operations. The court has reconsidered the exhibits 7 to 21, and is unable to find sufficient evidence of an order from one in authority to the lessee or successor calling for a cessation of operations under the lease and fixing the time and circumstances when such an event would take place. Should payment of a minimum royalty be refused upon such an unsatisfactory showing of a closing or curtailment of production? Paragraphs 7 and 24 of the lease present no great problem in interpretation, and for any of the causes set forth therein it would seem that the lessee would be authorized to shut down operations during the existence thereof.

As it appears to the court the only evidence of an actual closing or ending of operations under the lease is found in the testimony of Mr. Nicely, who

was an officer in charge of operations; he was a witness for the defendant, upon whom the burden rested to show when production ceased; on page 24 of the record, in answer to an inquiry as to when he moved out of a certain house, he said: "I don't recall when it was."; he was further questioned as to whether this was after September 1st, 1946, and he replied: "No, it was before that. It was roughly about the time the operation ceased."; which would seem to indicate that the operation ceased before the first of September, 1946. This comes the nearest to a definite closing-down date that the court recalls from the evidence.

On the subject of possession, to the court it seems to have been conclusively established by the evidence that the plaintiffs have never been in possession of the demised property since the defendant took possession under the lease, and were not in possession at the time this cause was tried. It does not seem necessary to extend this decision by a discussion of the evidence appearing in the record on this subject. How long such refusal of possession can continue in violation of the terms of the lease, after the termination thereof by the defendant, without some recompense to the plaintiffs, would seem to present a serious question. The plaintiffs claim they are entitled to rent for holding over and [388] keeping them out of possession, and the defendant responds by asserting that no evidence has been presented upon which a rental value can be based. But the minimum royalty during con-

tinuance of the lease and production was fixed at \$10,000. If notice is given that the lease is to be terminated, to take effect on a date certain, and the lessee holds over and continues in possession, would not he be required to pay the lessor the same amount as a rental for failure to yield possession upon the termination of the lease according to the provisions thereof? Plaintiffs have cited some well reasoned cases which would seem to indicate that such a rule should be applied. Defendant's counsel endeavor to dispose of this issue by saying that the rental value should be established by proof, that the property had no rental value and was practically worthless upon the termination of the lease, and, therefore, as a pertinent corollary, the lessee might hold over for an indefinite period, and the lessors have no means of recovering any compensation for the manifestly illegal act of the lessee. If the property was practically worthless, as asserted by defendant, it is difficult to understand how that would afford any justification for withholding possession from the lessors in violation of the express terms of the lease. As it seems to the court, the minimum royalty should stand for rental against the defendant for not complying with the terms of the lease in delivery of possession after termination thereof, and the court will so decide this issue.

According to the terms of the lease it was agreed that the plaintiffs should deed defendant not to exceed 200 acres for townsite and other purposes

named on written request therefor; but somehow, either the request was not made, or if made, the deed was not forthcoming, and it is not exactly clear how it happened, but as it transpired the defendant took over the Lake Placer ground as a townsite, without objection from any source, so far as appears in the record, and nothing whatever was done about paragraph 22 which provided for a quit claim deed of all interest of plaintiffs in not to exceed 200 acres of ground. If plaintiffs had deeded any interest they have or thought they had to Lake Placer ground, would they have laid any claim to the "wooden buildings"? Under paragraph 15 the question answers itself. It seems to have been an oversight on the part of [389] some representative of defendant that a quit claim deed to townsite ground was not obtained from plaintiffs as the lease provided. In discussing this question relating to the "wooden buildings", one of the defendant's queries is, can the plaintiffs prevent the removal of buildings they do not own from land they never owned? But the governing provisions of the lease must be considered. Paragraph 15 of the lease provides that upon termination thereof by either party "Lessee shall surrender peaceably the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and that lessors shall have the right to re-enter upon said leased premises owned by them

and appurtenances and take full and complete possession of the whole thereof upon the expiration of this lease or the termination of this lease for any reason by either party. Lessee shall have six (6) months' additional time to remove from the leased premises its personal property, and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises and ore on dumps upon which royalties have not been paid."

By giving effect to the context the wooden buildings mentioned here would seem to be specially associated with wooden mine structures, wooden tramway towers and ore on the dumps on the demised premises at the mine site. This part of the paragraph would seem to have special reference to the buildings and structures described at or around the mine. Could it apply to residences erected on a townsite by the lessee for occupancy by its employees; the language might be held to comprehend all wooden buildings on the demised premises, although it does not expressly so state; and when considered with paragraph 20, would seem to favor such interpretation, for it provides that "unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased upon the termination hereof, for a period of more than six months after such termination, shall conclusively be deemed to have

been abandoned by the lessee in favor of the lessors." But again it is provided in paragraph 22, that upon written request [390] therefor the lessors will by deed quit claim all lessors right, title and interest to property, not exceeding 200 acres, which is to be designated by lessee for use by lessee for townsite and other purposes. Plaintiffs assert that lessee never applied for a deed to such property under the lease. However, the buildings were erected upon the Lake Placer grounds without any question being raised or objection to use of such property for townsite purposes, and for which title was warranted by lessors in paragraph 31 of the lease, and to which defendant responds that plaintiffs did not have and have not now any title whatsoever.

It does not seem reasonable to assume in the absence of clear and unmistakable language to that effect that officers and Boards of the Government would undertake the expenditure of such large sums for homes of their employees on grounds used as a townsite, with the intention of making a present of such property to lessors upon the termination of the lease, and the language is by no means clear that such was their intention. The very fact that the contract provided for the conveyance of land by lessors for townsite and other purposes would seem to disclose the intent that any buildings erected thereon would become the property of lessees. From what has already been said a doubt might readily arise as to the exact meaning and application of the words "wooden buildings." On the one hand,

it might be said that only the wooden buildings at the mill site are to be included, while on the other, one might contend that all wooden buildings on the demised premises are to be included. Because of this apparent ambiguity the court is of the opinion that there would be no violation of the parol evidence rule to allow the testimony given on this subject to stand as explanatory of the meaning and application of this language, and which indicates it was not intended to embrace townsite buildings erected by the lessee for the housing of its employees, but related to the buildings at the mill site. This question is important, and the higher court may find a different solution, but in this court's view it was not the intention that the language to be construed would apply to the homes, or residences, on the Lake Placer Claim, and that they were not intended to become the property of the plaintiffs upon the termination of the [391] lease. It seems clearly established by the authorities cited that the royalty or rental payment for holding over cannot be trebled in this case against the Government or an agency thereof.

Court and counsel have been awaiting the outcome of an appeal from the Bureau of Land Management to the Secretary of the Interior relating to the adversary proceeding by the United States to cancel the Lake Placer Mining Claim. The District Land Office at Billings and, on appeal, the Bureau of Land Management, had previously decided the question in favor of the United States. Recently the Secretary affirmed the decision of the

Bureau of Land Management in holding that the second amended location of the Lake Placer Claim was invalid, but remanded the case to the Bureau on the original location "for further hearing upon the question whether the minerals on the claim, as described in the amended certificate of placer location, which was filed on June 16, 1941, constitute valuable mineral deposits, and for such action as may appear to be appropriate in the light of the information developed as a result of such hearing." In view of the court's attitude in respect to the Lake Placer Claim and the buildings thereon, it does not seem necessary to delay further, perhaps for several months, the decision in this case.

Having considered the pleadings, evidence, lease, and many of the statutes and authorities cited in the able briefs of counsel for the respective parties, in the opinion of the court the decision here should be for the plaintiffs in the matters heretofore indicated, together with immediate possession of the premises, if such possession has not already been given them since the trial of said cause; and for the defendant in regard to the ownership of the buildings on the Lake Placer Claim, and such is the order herein.

Findings and conclusions may be submitted accordingly. Costs go to the plaintiffs.

February 28, 1949.

/s/ CHARLES N. PRAY,

Judge.

[Endorsed]: Filed Feb. 28, 1949. [392]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO FILE A CERTIFIED DECISION OF THE SECRETARY OF THE INTERIOR

Counsel for respective parties were present in Court this day, Mr. H. L. Maury appearing for the plaintiff, and Mr. John B. Tansil, United States Attorney, appearing for defendant.

Thereupon Mr. Maury presented a motion for leave to file a certified copy of a certain decision of the Secretary of the Interior herein, and, there being no objection by counsel for defendant, Court ordered that leave be granted.

Entered in open Court March 3, 1949, at Great Falls, Montana.

H. H. WALKER,
Clerk. [394]

1-480

United States of America
Department of the Interior
Washington, D. C.

February 17, 1949.

Pursuant to Title 28, Paragraph 661, United States Code, I hereby certify that the annexed is a true copy of the original as it appears on the records and files of this Department.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[Seal]

C. C. DAVISON,
Acting Chief Clerk.

MGW [396]

United States Department of the Interior
Office of the Secretary
Washington
A-25527

January 27, 1949.

UNITED STATES

vs.

M. W. MOUAT, et al.

“N”

Billings 2120791

Adversary proceeding.

Affirmed in part and
remanded in part.

APPEAL FROM THE BUREAU OF LAND
MANAGEMENT

* * *

I.

This is an adversary proceeding which was instituted on behalf of the United States to cancel the

Lake Placer mining claim in sec. 20, T. 5 S., R. 15 E., P. M., Montana.

A hearing was held on June 24, 25, and 26, 1947, before the Acting Manager of the District Land Office at Billings, Montana. On November 5, 1947, the Acting Manager rendered a decision favorable to the United States. The defendants appeal to the Director of the Bureau of Land Management and, in a decision dated July 8, 1948, the Assistant Director of the Bureau of Land Management affirmed the decision previously rendered by the Acting Manager of the District Land Office. The defendants thereupon took an appeal to the head of the Department. A printed brief was submitted and an oral argument was made in support of this appeal.

The original Certificate of Location relating to the Lake Placer claim, comprising 160 acres, was filed with the clerk and recorder of Stillwater County, Montana, by Paul A. De Lannoy, Margaret De Lannoy, Susie C. Rohder, Charles L. Buck, E. A. Rowe, J. G. Link, H. E. Duba, and R. L. Duba on July 16, 1940. It referred to the claim as "being valuable for gold, serpentine and associated minerals."

On June 16, 1941, an Amended Certificate of Placer Location was filed by the original locators. This certificate made certain adjustments in the boundaries of the claim, and asserted [397] that

gold had been discovered on each 20-acre tract of the claim.

On April 17, 1946, a Second Amended Certificate of Lake Placer Mine Location was filed by M. W. Mouat, purporting to act as agent on behalf of the original locators. It made further changes in the boundaries of the claim, and stated that "this said Lake Placer is valuable for gold, serpentine and associated minerals."

II.

With regard to the second amended location, the Government alleged in its pleadings that:

"The purported second amended location of the claim is void and of no effect because made by persons who, at the time of such attempted amendment, had no right or title to the claim * * *."

In support of this allegation, the Government introduced at the hearing:

(a) A certified copy of a conveyance dated November 4, 1941, by which, among other things, P. A. de Lannoy, Margaret de Lannoy, and Susie C. Rohder quitclaimed to May Paula Mouat their interests in the Lake Placer mining claim;

(b) A certified copy of a conveyance dated October 30, 1941, by which, among other things, J. G. Link, H. E. Duba, and R. L. Duba quitclaimed to May Paula Mouat their interests in the Lake Placer mining claim;

(c) A certified copy of a conveyance dated October 30, 1941, by which, among other things, Charles L. Buck and E. A. Rowe quitclaimed to

May Paula Mouat their interests in the Lake Placer mining claim;

(d) A certified copy of a conveyance dated February 2, 1942, by which Charles L. Buck again quit-claimed his interest in the Lake Placer mining claim, this time to M. W. Mouat; and

(e) A testimony from Charles Buck to the effect that he was one of the original locators of the Lake Placer claim, that prior to the date of the second amended location he had conveyed his entire interest in the claim for a consideration of \$25, and that he had no recollection of having authorized [398] the use of his name in connection with the second amended location of the claim.

The Government's case on this point was not counterbalanced by any clear evidence on the part of the defendants showing that, notwithstanding the conveyances mentioned above, the persons named in the Second Amended Certificate of Lake Placer Mine Location actually were possessed of interests in the claim as of April 17, 1946, the date on which the certificate was executed and filed, and that they had authorized M. W. Mouat to act as their agent in executing and filing the certificate.

It perhaps should be noted in this connection that when the defendant May Paula Mouat was asked by defendants' counsel the leading question, "And you were a trustee for the various owners," she responded, "Yes, sir" (Tr. 169); and that the Government's witness Charles Buck indicated on cross-examination that, at the time of the exe-

cution of his quitclaim deed in favor of M. W. Mouat, he "understood" that he "would have an interest coming back" (Tr. 66), the nature of the "interest" and the time when it would be "coming back" not being specified. Fragmentary and vague evidence of this sort does not, however, have sufficient probative value to overcome the plain language in the quitclaim deeds indicating that the original locators had wholly divested themselves of their interests in the claim prior to the date of the execution and filing of the Second Amended Certificate of Lake Placer Mine Location by Mr. Mouat, purporting to act as their agent.

The preponderance of the evidence clearly supports a finding that the persons on whose behalf Mr. Mouat purported to act as agent in executing and filing the Second Amended Certificate of Lake Placer Mine Location did not have any interest in the claim at the time of the execution and filing of this certificate. [399]

Moreover, the evidence indicates (but with less than complete clarity) that at least a substantial portion of the land which the Second Amended Certificate of Lake Placer Mine Location sought to bring within the claim for the first time was already being devoted by a Government agency to a public use under proper authority.

Accordingly, the decision of the Assistant Director of the Bureau of Land Management should be affirmed in so far as it holds the second amended location of the Lake Placer claim to be invalid.

III.

With respect to that part of the Lake Placer claim which is based upon the original location and the first amended location, the Government's allegation of invalidity in its pleadings is based upon the contention that minerals have not been found within the limits of the claim "in sufficient quantities to constitute a valid discovery."

The establishment of a valid placer mining claim on public land is contingent upon the discovery of "valuable mineral deposits"¹ in a form other than a vein or lode.² In determining whether mineral deposits discovered on public land are "valuable," the test to be applied is whether they are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine."³

The evidence in this case shows that there are, within the limits of the Lake Placer claim under the Amended Certificate of Placer Location, great quantities of loose rocks containing olivine, serpentine, and pyroxene, and also some loose fragments of chromite.

In attempting to show that these minerals do not constitute [400] "valuable mineral deposits," as that phrase is used in the mining laws, the Government at the hearing elicited from its witness Walter H. Koch, a field examiner of the Bureau of Land

¹30 U.S.C., 1946 ed., sec. 22.

²30 U.S.C., 1946 ed., sec. 35.

³Cameron et al. v. United States, 252 U.S. 450, 459 (1920).

Management, the statement that the rocks on this claim, containing olivine, serpentine, and pyroxene, "didn't contain any valuable mineral" (Tr. 12); the view that "it has not been demonstrated that a market exists for this type of material" (Tr. 57), based on the circumstance that no use had been made by the Government during World War II, when the need for minerals was acute, of large quantities of crushed olivine and serpentine available in this area as a byproduct of the processing of chromite from lode claims in the vicinity; and the opinion that "the showings thereon (i.e., on the Lake Placer claim) would not justify a prudent man to invest further money and spend additional time in developing same" (Tr. 13). The Government also elicited from its witness Hugh G. Nicely, a mining engineer, a negative answer to the question whether "a prudent man would not be justified in spending time and money and effort on the Lake Placer mining claim in the hope of developing a paying mine on it" (Tr. 77); and the information that a Government-owned mill, which was operated for a time during World War II within the limits of this claim for the processing of chromite taken from lode claims in the vicinity of the Lake Placer claim, had been closed by the Government before the end of the war (this testimony was apparently adduced in order to furnish a basis for an inference that the chromite in this area is of such inferior quality or unfavorable location that the extraction of chromium from it was impracticable, even under the spur of wartime need).

The more persuasive items of the defendants' evidence concerning the value of the mineral deposits on the Lake Placer claims consisted of general information with respect to the usefulness of olivine as a refractory material and the marketing of olivine for that purpose in another part of the United States, and the development by the [401] Tennessee Valley Authority of a process for the fusing of olivine and rock phosphate in the production of fertilizer (there is a large phosphoria formation in the vicinity of the Lake Placer claim and its olivine). These data hint—although they do now show—that there is a reasonable prospect of developing a profitable operation out of the olivine (and perhaps the serpentine, an altered form of olivine) on the Lake Placer claim.

The material in the record pertaining to the value of the mineral deposits on the Lake Placer claim under the first amended location is indecisive. The conclusions expressed by the Government's witnesses on this issue are not buttressed by adequate factual data in the record showing clearly a lack of economic value in these minerals because of their nature, quality, quantity, or location, or because of other factors. Accordingly, the Government's evidence on this point lacks the degree of completeness which would warrant an unequivocal finding that the Government has established that the minerals on the claim do not constitute "valuable mineral deposits." Conversely, the defendants' evidence is insufficient to establish affirmatively that

the mineral deposits on the Lake Placer claim are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine" out of this particular claim.

Accordingly, it appears that this case, in so far as it relates to the validity of the claim based upon the original location and the first amended location, should be remanded to the Bureau of Land Management for a further hearing on the question whether the minerals on the claim constitute "valuable mineral deposits," as that phrase is used in the mining laws.

IV.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Assistant Director of the Bureau of Land Management is affirmed in so far as it holds the second amended location of the Lake Placer claim to be invalid, and the case is remanded to the Bureau of Land Management for a further hearing upon the question whether the minerals on the claim, as described in the Amended Certificate of Placer Locations which was filed on June 16, 1941, constitute valuable mineral deposits, and for such action as may appear to be appropriate in the light of the information developed as a result of such hearing.

/s/ MASTIN G. WHITE,
Solicitor.

[Endorsed]: Filed March 3, 1949. [403]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court has considered the proposed findings of fact and conclusions of law, and the proposed judgments, submitted by counsel for the respective parties, and the supporting briefs, in connection with the opinion heretofore filed in said cause, and now being duly advised and good cause appearing therefor, makes and submits herewith findings of fact, followed by conclusions of law and judgment in the above entitled action.

Findings of Fact

On December 20th, 1941, the plaintiffs, May Paula Mouat and M. W. Mouat, wife and husband, and May Paula Mouat as trustee, executed and delivered to Metals Reserve Company, a corporation organized under the laws of the United States, a certain lease, for valuable consideration, for the term of ten years from its date, upon all of the following described property in Stillwater County, Montana, to-wit:

“Those certain patented quartz lode mining claims situated in Twp. 5 South, Range 15 East, M.P.M., in Stillwater County, Montana, known and described as:

Bald Eagle—U. S. Lot No. 69D

Mountain View—U. S. Lot No. 63-A

Rough Rock—U. S. Lot No. 63-B

Also, all those certain unpatented quartz lode

mining claims situated in Twp. 5 South, Range 15 E., M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in [405] Stillwater County, Montana, in the records of said County, on the dates, and in the respective books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Adam	July 19, 1941	24 Misc.	207
Princtons	May 8, 1941	24 Misc.	122
Skunk	May 8, 1941	24 Misc.	128
Sampson	May 8, 1941	24 Misc.	126
Oldeo	May 8, 1941	24 Misc.	124
Link	July 19, 1941	24 Misc.	209
Pete	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	288
Scully	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	286
Denver	Oct. 7, 1918	7 Misc.	233
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	291
Old Lady	July 11, 1918	7 Misc.	114
Westlake	July 11, 1918	7 Misc.	116
Billie	Oct. 17, 1918	7 Misc.	242
Chas. F.	July 11, 1918	7 Misc.	118
(Amended Cert.)			
Old Lady	Oct. 17, 1941	24 Misc.	289
Chas. F.—Continued:			
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	287
Gap	July 31, 1941	24 Misc.	219
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	290
Jame	Oct. 3, 1941	24 Misc.	271
Soup	Oct. 3, 1941	24 Misc.	273
Pine	Oct. 2, 1919	8 Misc.	167

Also, all those certain unpatented quartz lode mining claims situated in Twp. 5 South, Range 15 East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Park County, Montana, in the records of the said County, on the dates, and in the respective books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Smelter	Sept. 23, 1887	Vol. 1 Quarts Locations	25
Smelter	June 8, 1889	Vol. 1 Quarts Locations	420

Also, that certain unpatented placer mining claim and that certain unpatented tunnel site situated in Twp. 5 So., Range 15 E., M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said county, on the dates, and in the respective books, and on the respective [406] pages, as follows:

Name	Date Cert. Recorded	Book	Page
Lake Placer	July 16, 1940	23 Misc.	400
(Amended Cert.)	June 16, 1941	24 Misc.	155
Monte Alto Tunnel and Tunnel Site	Aug. 13, 1918	7 Misc.	159

Also, all of the right, title and interest of said lessors now owned, or which may be hereafter acquired, in and to those certain unpatented quartz

lode mining claims situated in Twp. 5 South, Range 15 East, M.P.M., Stillwater County, Montana, the certificates of location of which were recorded in the office of the County Clerk and Recorder of said Stillwater County, Montana, in the records of said County, on the respective dates, and in the books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Mountain View Chrome Co. #1	Sept. 22, 1939	23 Misc.	43
Mountain View Chrome Co. #2	Aug. 31, 1940	23 Misc.	434

Also, all water and water rights, ditch and ditch rights, flumes, easements, rights-of-way, permits from United States Forest Service, buildings and improvements upon, or used, or for use, in connection with the above described premises.

II.

That by Act of Congress of date June 30, 1945, all of the rights under the said lease, and all of the obligations under the said lease of Metals Reserve Company, were transferred to defendant, Reconstruction Finance Corporation, and on said day Reconstruction Finance Corporation became the assignee of Metals Reserve Company's interest in said lease, and remained such thereafter.

III.

The said lease provided that beginning January 1, 1943, and thereafter during the term of this lease, lessee agrees to pay to, and deposit with, the Yellowstone Bank of Columbus, Montana, for the benefit of May Paula Mouat, as trustee, a minimum royalty of Ten Thousand (\$10,000) Dollars per year, payable quarterly on or before thirty days after the end of each calendar quarter, but if the total [407] royalties paid on ores mined equal or exceeded the minimum in any calendar year, such would comply with the minimum royalty obligations, and that a royalty payment in excess of Ten Thousand (\$10,000) Dollars in any year could not be credited to the payment of any royalty of a succeeding year, but earned royalty in any quarter might be applied to any other quarter of such royalty year.

IV.

The said lease also provided:

“Provided, however, should lessee’s construction or development or mining or milling operations, or any other operation hereunder be suspended because of any of the causes or reasons set forth in paragraph 24 hereof, lessee’s obligation to pay a minimum royalty, as aforesaid, shall be suspended during any and all periods where such causes or reasons exist, and the obligation to pay such minimum royalty shall be reduced in such proportion as the period of suspension of operations bears to the entire calendar year.”

V.

Paragraph 24 of the said lease is as follows:

“Anything in this lease contained to the contrary notwithstanding, any strike, lockout, difference with workmen, accident, fire, explosion, flood, earthquake, embargo, mobilization, war, foreign war, hostility, riot, requirement, regulation, restriction, or other act of any government or governments, whether legal or otherwise, acts of public enemies, the elements, force majeure, inability to secure, or delay in securing cars, labor, raw materials, fuel, or other supplies or material or electric power necessary for the operation of the leased premises or the operation of lessee’s facilities, failure of the ore supply or loss of the ore body in the said leased premises, or inability to secure sufficient ore of the grade required for concentrating from the said leased premises, unforeseen metallurgical or milling delays, delays or interruptions in transportation by rail, water or otherwise, damage to, or destruction of such mines or plants or other operating facilities and any other contingency, whether or not of the nature or character hereinbefore specifically enumerated, which is beyond the control of lessee, or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist.”

VI.

The lease provided that it might be renewed for an additional ten years if the lessee gave notice in

writing thirty days prior to the expiration of the lease.

VII.

The defendant failed to introduce sufficient evidence at the trial to show that any act occurred sufficient to relieve the [408] defendant, or its predecessor, the Metals Reserve Company, from the duty to pay minimum royalty under paragraph 24, and the burden of proof as hereafter found in Conclusions of Law, is upon the defendant to show absolution by reason of any exception set out in paragraph 24 of the lease. Lessee agreed in the lease to carry on "its operations diligently."

VIII.

The lease provided that the lessee might terminate the same by giving a written notice to the lessors, and on November 15, 1945, the lessee notified the lessors in writing that the lease would be terminated, and that surrender, termination and cancellation would be effective February 28, 1946.

IX.

The said lease provided that upon termination, the lessee shall deliver to lessors a proper release or certificate of that fact, duly executed and acknowledged. The defendant has never delivered to lessors any such certificate. The failure to do so constitutes a cloud upon plaintiffs' title to the lands described in the lease, and in these findings described.

X.

The lease provided that upon the termination,

lessee should surrender peaceably the leased premises and appurtenances in good order with the maintenance of possessory claims and rights and permits fully met, and that lessors should have the right to re-enter upon the leased premises owned by them, and appurtenances, and take full and complete possession of the whole thereof. That the lessee has not surrendered the said premises, or any part thereof, to the lessors; that lessee, by show of force, and armed guards and servants in possession, has wrongfully withheld the possession of the said premises, and all thereof, from the plaintiffs, and this up to the conclusion of the evidence in this case, to-wit: November 14th, 1947.

XI.

Paragraph 15 of the lease provides that upon termination thereof by either party "Lessee shall surrender peaceably the leased premises and appurtenances in good order with all payments [409] and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and that lessors shall have the right to re-enter upon said leased premises owned by them and appurtenances and take full and complete possession of the whole thereof upon the expiration of this lease or the termination of this lease for any reason by either party. Lessee shall have six (6) months additional time to remove from the leased premises its personal property, and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timber-

ing, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises and ore on dumps upon which royalties have not been paid." And the lease provided that time was of the essence of all of the grants, terms and covenants, stipulations and conditions expressed in the lease, and that such should run with the land.

XII.

That the Metals Reserve Company went into peaceable possession of all of the real property described in the lease at the day of its execution, and remained in peaceable and undisturbed possession until its duties and liabilities, and the said lease, were transferred to the Reconstruction Finance Corporation. That Reconstruction Finance Corporation, from the day of such transfer, remained in peaceable and undisturbed possession of all of the said property until February 28, 1946, the day when the plaintiffs were notified by said defendant that the lease would expire; that the possession of the defendant has in no wise been disturbed by any third party before, or on the last day of the introduction of evidence in this case, to-wit: November 14th, 1947.

XIII.

When the lease expired there had been built by the defendant, or its predecessor in interest, Metals Reserve Company, on the leased land, known and described as the Lake Placer claims and there were

still present on the land, 103 wooden buildings, on cement foundations, with wiring and plumbing, (which plumbing and wiring went partly through the walls and foundations), and oil storage tanks appurtenant and buried, and piping appurtenant; on the expiration of the lease, February 28th—March 1, 1946, all these immediately became the property of defendant.

XIV.

The amount equalling the minimum rental due and unpaid during the period the defendant has held wrongfully the premises from March 1st, 1946, until the trial, is Seventeen Thousand, Fifty-five and 44/100 (\$17,055.44) Dollars.

XV.

The lease provided:

“Promptly upon receipt of lessee’s written request, lessors will execute and deliver to lessee a quitclaim deed to all of the lessors’ right, title and interest in and to property not to exceed 200 acres, to be designated by lessee, for use by lessee, for millsites, townsites, stock piling, and tailings disposal.”

XVI.

No evidence was introduced that lessee ever made any written request that lessors execute or deliver to lessee any quitclaim deed to any interest in any property not to exceed 200 acres, or otherwise, or that plaintiffs ever refused to do so. But it was the intention of the parties that land would be furnished

by the lessor for the construction of townsites and it was further the intention of the parties that the "buildings" to be left on the premises after termination would include only ordinary wooden buildings such as tool houses, machine houses, etc., and other structures necessarily constructed in connection with mining operations. It was not the parties intention that buildings constructed as part of a townsite should be left on the premises upon termination of the lease.

XVII.

The lease provided: "It is mutually agreed that this lease is a Montana contract, and shall be interpreted and construed under, and by the laws of the State of Montana." [411]

XVIII.

That the reasonable rental value of the premises described in the lease agreement, during the period from March 1, 1946, to the conclusion of the trial, November 14, 1947, was, and is, the reasonable sum of Ten Thousand (\$10,000) Dollars per year.

XIX.

Defendant has failed to pay to the plaintiffs the sum of Ten Thousand (\$10,000) Dollars due as minimum royalty under the lease agreement for the year 1944, and which was due and payable on December 21, 1944.

Defendant has failed to pay to plaintiffs the sum of Ten Thousand (\$10,000) Dollars due as minimum royalty under the lease agreement for the year

1945, and which was due and payable on December 21, 1945.

Defendant has failed to pay to plaintiffs the sum of One Thousand, Six Hundred, Sixty-six and 66/100 (\$1,666.66) Dollars, due as minimum royalty under the lease agreement for the months of January and February, 1946, and which was due and payable on March 1, 1946.

Defendant has failed to pay to plaintiffs the sum of Ten Thousand (\$10,000) Dollars due, as the reasonable rental value of the premises described in the complaint, and payable on March 1, 1947.

Defendant has failed to pay to plaintiffs the sum of Seven Thousand, Fifty-five and 44/100 (\$7,055.44) Dollars due, as the reasonable rental value of the premises described in the complaint, and payable on November 14th, 1947, the date of the conclusion of the trial.

XX.

The court finds that it has jurisdiction of the parties hereto, and of the subject matter in controversy. [412]

Conclusions of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

This Court has jurisdiction of the parties, plaintiffs and defendant, and of the subject matter in controversy.

II.

The plaintiffs are the owners of or have possessory claims to, and are entitled to immediate possession of, all of the land and property described in the complaint, and hereinbefore described in the Findings of Fact, except the Lake Placer claims, title to which is now awaiting the decision on appeal by the Secretary of the Interior.

III.

The plaintiffs are entitled to have and recover of and from the defendant, Reconstruction Finance Corporation, a corporation, the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six (6%) percent. per annum from December 21, 1944, until paid; the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six (6%) percent. per annum from December 21, 1945, until paid; the sum of One Thousand, Six Hundred Sixty-six and 66/100 (\$1,666.66) Dollars, together with interest thereon at the rate of six (6%) percent. per annum from March 1, 1946, until paid; the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six (6%) percent. per annum from March 1, 1947, until paid, and, the sum of Seven Thousand, Fifty-five and 44/100 (\$7,055.44) Dollars, together with interest thereon at the rate of six (6%) percent. per annum from November 14, 1947, until paid. [413]

IV.

Defendant Reconstruction Finance Corporation, a corporation, is the owner, and entitled to possession of all houses, buildings, or structures situated and being upon the Lake Placer Mining Claims.

V.

The plaintiffs shall have and recover their costs of suit.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 11, 1949. [414]

United States District Court for the District of
Montana, Billings Division

Civil Action No. 871

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and MAY PAULA MOUAT as
Trustee of an express trust,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation,

Defendant.

JUDGMENT

Be It Remembered, that this cause came on regularly for trial at Billings, before the Court, the Hon. Charles N. Pray, Judge Presiding, without a jury,

on November 12th, 13th and 14th, 1947. The plaintiffs were represented by Thomas C. Colton, Lowndes Maury and A. G. Shone, attorneys at law; the defendant was represented by Mr. Thomas L. McKevitt, Assistant United States Attorney General, Mr. William T. Lennon, Assistant General Counsel, War Assets Administration, Mr. John B. Tansil, United States District Attorney, and his assistant, Mr. Franklin A. Lamb. Witnesses were sworn and testified on the part of the respective parties. The cause was dismissed as to War Assets Administration, and proceeded only as to the defendant, Reconstruction Finance Corporation. At the conclusion of the testimony, the Court took the cause under advisement, and briefs were submitted by the respective parties. On the 28th of February, 1949, the Court made and filed its opinion, and pursuant to the said opinion, and in accord therewith,

It Is Hereby Adjudged and Decreed, that the plaintiffs are entitled to the immediate possession of all of the following described real property, as follows, to-wit:

Those certain patented quartz lode mining claims situated in Twp. Five (5) South, Range Fifteen (15) East, M.P.M., in Stillwater County, Montana, known and described as

Bald Eagle—U. S. Lot No. 69-D

Mountain View—U. S. Lot No. 63-A

Rough Rock—U. S. Lot No. 63-B.

Also, all those certain unpatented quartz lode mining claims situated in Twp. Five (5) South,

Range Fifteen - (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder of Stillwater County, Montana, in the records of said County, on the dates, and in the respective books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Adam	July 19, 1941	24 Misc.	207
Princtons	May 8, 1941	24 Misc.	122
Skunk	May 8, 1941	24 Misc.	128
Sampson	May 8, 1941	24 Misc.	126
Oldeo	May 8, 1941	24 Misc.	124
Link	July 19, 1941	24 Misc.	209
Pete	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	288
Scully	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	286
Denver	Oct. 7, 1918	7 Misc.	233
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	291
Old Lady	July 11, 1918	7 Misc.	114
Westlake	July 11, 1918	7 Misc.	116
Billie	Oct. 17, 1918	7 Misc.	242
Chas. F.	July 11, 1918	7 Misc.	118
(Amended Cert.)			
Old Lady	Oct. 17, 1941	24 Misc.	289
Chas. F.—Continued:			
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	287
Gap	July 31, 1941	24 Misc.	219
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	290
Jame	Oct. 3, 1941	24 Misc.	271
Soup	Oct. 3, 1941	24 Misc.	273
Pine	Oct. 2, 1919	8 Misc.	167

Also, all those certain unpatented quartz lode mining claims situated in Twp. Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in [417] Park County, Montana, in the records of the said County, on the dates, and in the respective books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Smelter	Sept. 23, 1887	Vol. 1 Quarts Locations	25
Smelter	June 8, 1889	Vol. 1 Quarts Locations	420

Also, that certain unpatented placer mining claim, and that certain unpatented tunnel site, situated in Twp. Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said County, on the dates, and in the respective books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Lake Placer	July 16, 1940	23 Misc.	400
(Amended Cert.).....	June 16, 1941	24 Misc.	155
Monte Alto Tunnel and Tunnel Site	Aug. 13, 1918	7 Misc.	159

Also, all of the right, title and interest of said lessors, now owned, or which may be hereafter acquired, in and to those certain unpatented quartz lode mining claims situated in Twp. Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which were recorded in the office of the County Clerk and Recorder of said Stillwater County, Montana, in the records of said County, on the respective dates, and in the books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Mountain View Chrome Co. #1	Sept. 22, 1939	23 Misc.	43
Mountain View Chrome Co. #2	Aug. 31, 1940	23 Misc.	434

Also, all water and water rights, ditch and ditch rights, flumes, easements, rights-of-way, permits from United States Forest Service, buildings and improvements upon, or used, or for [418] use, in connection with the above described premises.

It Is Further Adjudged and Ordered, that the Clerk of the Court issue to the Marshal of the Court, a Writ of Possession and of Assistance that the Marshal of this Court place the plaintiffs in possession of all and singular the above entitled prop-

erty hereinbefore described, and to be described in such Writ.

It Is Further Adjudged that the plaintiffs have and recover of and from the defendant, Reconstruction Finance Corporation, a corporation, the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six (6%) per cent. per annum from December 21, 1944, until paid; the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six per cent per annum from December 21, 1945, until paid; the sum of One Thousand, Six Hundred, Sixty-six and 66/100 (\$1,666.66) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from March 1, 1946, until paid; the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six per cent. per annum from March 1st, 1947, until paid; and the sum of Seven Thousand, Fifty-five and 44/100 (\$7,055.44) Dollars, together with interest thereon at the rate of six (6%) per cent. per annum from November 14, 1947, until paid; and,

It Is Adjudged that defendant, Reconstruction Finance Corporation, a corporation, is the owner, and entitled to the possession of all houses, buildings, or structures situated, and being upon the Lake Placer Mining Claims and without requirement of immediate removal.

It Is Adjudged that the plaintiffs have and recover their costs of suit to be fixed by the Clerk

of this Court, and taxed at the sum of One Hundred Ninety-seven and 29/100 Dollars.

Dated this 11th day of June, 1949.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 11, 1949. [419]

[Title of District Court and Cause.]

MOTION TO MAKE ADDITIONAL FINDINGS

Come now the above named plaintiffs, and move the above entitled court to make additional Findings of Fact in the above entitled cause so as to cover all of the material issues presented in the case, and in support of the said Motion, plaintiffs move and request the court to specially find as follows:

I.

The defendant did not leave intact the "foundations" or "wooden buildings" upon the demised land, but while wrongfully holding possession from plaintiffs, after March 1st, 1946, and previous to September 1st, 1946, without plaintiffs' consent, tore out from, and stripped the said buildings of all plumbing in place, all wiring in place, some doors and windows and oil storage tanks in place, and pipes appurtenant, and carried off of the demised land the said plumbing, wiring, oil storage tanks, piping, doors and windows, and converted the same to its uses.

II.

That the reasonable and necessary costs of replacing the said plumbing, wiring, doors, windows, oil storage tanks [421] and pipes appurtenant thereto, was, and is the sum of Ninety Thousand (\$90,000) Dollars.

III.

The defendant, without plaintiffs' consent, between March 1st and September 1st, 1946, removed from the leased premises and converted to its use, one house of the value of Six Hundred (\$600) Dollars.

IV.

The defendant, without plaintiffs' consent, permitted a third party, after September 1st, 1946, and before the hearing herein, to remove and convert to its own use, and such third party did remove and convert to its own use, and use of defendant, from said premises, twenty-one houses of the value of Seven Hundred (\$700) Dollars each,—a total of Fourteen Thousand, Seven Hundred (\$14,700) Dollars.

This motion is made and based upon the pleadings and evidence introduced in the trial of the above entitled cause.

Dated at Butte, Montana, this 18th day of June, 1949.

THOMAS C. COLTON,

H. L. MAURY,

A. G. SHONE,

Attorneys for plaintiffs.

Service of the foregoing Motion is hereby acknowledged, and copy thereof received this 18th day of June, 1949.

JOHN B. TANSIL,
FRANKLIN A. LAMB,
EMMETT C. ANGLAND,
Attorneys for defendant.

[Endorsed]: Filed June 18, 1949. [422]

[Title of District Court and Cause.]

**MOTION TO REOPEN FINAL JUDGMENT
AND TO TAKE ADDITIONAL TESTIMONY**

The defendant, Reconstruction Finance Corporation, pursuant to Rule 60 (b), Federal Rules of Civil Procedure, moves the court for an order reopening the judgment entered in this cause on June 11, 1949, and for an order directing that additional testimony be taken on the factual issue relating to the date that actual production was terminated by Metals Reserve Company, or its agent, on the leased premises. It is further moved that the findings of fact and conclusions of law be amended to conform with such additional proof and that judgment be entered accordingly.

The grounds for this motion are as follows:

1. The part of the judgment in this case which awards money damages to the plaintiffs in the sum of approximately \$50,000 is predicated solely upon the absence of proof in the record that production

ceased at any time prior to the date the lease was terminated (Finding of Fact No. VII).

2. As an unqualified matter of fact, however, there can be no question, nor is there any dispute, that the mine and mill were not actually operated in 1944 and 1945 or any time thereafter. There is submitted herewith the affidavits of David R. Nelson, Hugh G. Nisely and Martin C. Messner and detailing the fact that the operation and all production at the mine terminated prior to January 1, 1944. [424]

3. No issue was ever raised either in the pleadings or at the trial with respect to the fact that production ended in 1943. In fact the matter was first alluded to in the plaintiffs' reply brief. Under the lease the plaintiffs were entitled to a minimum royalty and a greatly increased royalty in time of production. Their action was brought solely for a minimum royalty. No accounting was asked for production royalties. This could only mean that they acknowledged there had been no production in 1944 and 1945. In any event, the whole theory of their suit was based on the presumption of nonproduction.

4. At the trial, the defendant introduced (a) its Exhibit No. 7, showing that cessation of production was ordered by the War Production Board on September 16, 1943 (b) its Exhibit No. 17, showing that Metals Reserve Company, on September 22, 1943, directed its agent, the Anaconda Mining Company, to close down the operation, and (c) its Exhibit No. 13, showing that on December 13, 1943,

Metals Reserve Company informed the plaintiffs that production had ceased. Plaintiffs objected to these exhibits only on general grounds. At no time did they suggest that there was any doubt or even any issue with respect to the fact that production was terminated in 1943. Throughout the trial no mention of this issue was ever made. The lengthy hearing was confined entirely to the other issues of the case.

5. It is not the purpose of this motion to re-argue here the contention that the record as now constituted shows that production ended in 1943. It seems meaningless to argue as a matter of law a subject which can be definitely settled by two minutes of uncontradictable testimony. Consequently, it is respectfully represented to the court that there can be no honest dispute that production ended in 1943, that the proof on this issue can be completely covered by the addition of a few questions and answers to one witness. The failure to put in this simple bit of undisputed testimony was the result of a mistake and inadvertence caused by the way the issues were framed, the lack of any presentation of an issue on this point, the absolute lack of any prior contention by the plaintiffs that production had not ceased, the knowledge that the plaintiffs were entirely familiar with the operations including the beginning and cessation of production on the leasehold area and the conclusion that the documentary evidence, unchallenged on this point, completely covered the issue.

6. As the matter now stands, the defendant has had judgment entered against it in approximately the sum of \$50,000 by reason of a particularly close question relating to the burden and sufficiency of proof. It is submitted that substantial justice requires that an opportunity be given to dispel all and any doubts on the relatively simple factual issue.

RECONSTRUCTION FINANCE
CORPORATION,

By JOHN B. TANSIL,
United States Attorney.

FRANKLIN A. LAMB,
Assistant United States
Attorney.

By JOHN B. TANSIL,
THOMAS L. McKEVITT,
THOMAS L. McKEVITT,
Attorney, Department of
Justice.

By JOHN B. TANSIL.

[Endorsed]: Filed July 20, 1949. [426]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given the Reconstruction Finance Corporation, a corporation, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action to June 11, 1949.

THOMAS L. McKEVITT,
Assistant U. S. Attorney
General.

WILLIAM T. LENNON,
Assistant General Counsel,
War Assets Administration.

JOHN B. TANSIL,
U. S. District Attorney,
District of Montana.

FRANKLIN A. LAMB,
Assistant U. S. District Attorney, District of Mon-
tana.

[Endorsed]: Filed Aug. 9, 1949. [428]

[Title of District Court and Cause.]

ORDER

Upon the reading and filing of the petition of Reconstruction Finance Corporation, the defendant above-named, and good cause showing:

It Is Ordered that the defendant Reconstruction Finance Corporation shall have ninety days from and after August 9, 1949 within which to prepare and file its record on appeal in the Ninth Circuit Court of Appeals.

Done this 14th day of September, 1949.

CHARLES N. PRAY,
U. S. District Judge.

[Endorsed]: Filed, entered Sept. 14, 1949. [432]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The district court erred in finding as follows:

VII. "The defendant failed to introduce sufficient evidence at the trial to show that any act occurred sufficient to relieve the defendant, or its predecessor, the Metals Reserve Company, from the duty to pay minimum royalty under paragraph 24, and the burden of proof as hereafter found in Conclusions of law, is upon the defendant to show absolution by reason of any exception set out in paragraph 24 of the lease. Lessee agreed in the lease to carry on its operations diligently."

2. The district court erred in finding as follows:

X. "The lease provided that upon the termination, lessee should surrender peaceably the leased premises and appurtenances in good order with the maintenance of possessory claims and rights and

permits fully met, and that lessors should have the right to re-enter upon the leased premises owned by them, and appurtenances, and take full and complete possession of the whole thereof. That the lessee has not surrendered the said premises, or any part thereof, to the lessors; that lessee, by show of force, and armed guards and servants in possession, has wrongfully withheld the possession of the said premises, and all thereof, from the plaintiffs, and this up to the conclusion of the evidence in this case, towit: [434] November 14th, 1947."

3. The district court erred in finding as follows:

XIV. "The amount equalling the minimum rental due and unpaid during the period the defendant has held wrongfully the premises from March 1st, 1946, until the trial, is Seventeen Thousand, Fifty-five and 44/100 (\$17,055.44) Dollars."

4. The district court erred in finding as follows:

XVIII. "That the reasonable rental value of the premises described in the lease agreement, during the period from March 1, 1946, to the conclusion of the trial, November 14, 1947, was, and is, the reasonable sum of Ten Thousand (\$10,000) Dollars per year."

5. The district court erred in holding that appellant was liable for minimum royalties from January 1, 1944, to February 28, 1946, pursuant to the agreement of December 20, 1941.

6. The district court erred in holding that appellant was liable to appellee at the rate of \$10,000

a year for occupancy of the leased premises from March 1, 1946, to November 14, 1947.

7. The district court erred in entering judgment for appellee in the sum of \$38,722.10 with interest.

By /s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ JOHN B. TANSIL,
United States Attorney,
Billings, Montana.

/s/ JOHN F. COTTER,
Attorney, Department of
Justice, Washington, D. C.

/s/ FRANKLIN A. LAMB,
Assistant U. S. Attorney,
Billings, Montana.

Service of the foregoing Statement of Points on Appeal and receipt of a true copy of same acknowledged this 20th day of September, 1949.

THOMAS C. COLTON,
Of Counsel for Plaintiffs.

[Endorsed]: Filed Sept. 21, 1949. [435]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The Reconstruction Finance Corporation, appellant in the above-entitled cause, designates the following for inclusion in the record on appeal:

Complaint. Filed September 17, 1946.

Motion to dismiss by War Assets Administration. Filed November 17, 1946.

Answer of Reconstruction Finance Corporation. Filed November 26, 1946.

Order granting motion to dismiss and dismissing cause as to War Assets Administration. Filed October 25, 1947.

Record of proceedings at the trial.

Plaintiffs' Exhibit No. 1.

Plaintiffs' Exhibit No. 2.

Court's decision and order for judgment. Filed February 28, 1949.

Court's findings of fact and conclusions of law. Filed June 11, 1949.

Judgment. Filed June 11, 1949.

Defendant's notice of appeal. Filed August 9, 1949.

Statement of points upon which appellant relies.

This designation of the contents of the record on appeal.

RECONSTRUCTION
FINANCE CORPORATION,
Appellant.

By /s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ JOHN B. TANSIL,
United States Attorney,
Billings, Montana.

/s/ JOHN F. COTTER,
Attorney, Department of
Justice, Washington, D. C.

/s/ FRANKLIN A. LAMB,
Assistant U. S. Attorney,
Billings, Montana.

Service of the foregoing Designation of Record on Appeal and receipt of a true copy of same acknowledged this 20th day of September, 1949.

THOMAS C. COLTON,
Of Counsel for Plaintiffs.

[Endorsed]: Filed Sept. 21, 1949. [438]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF THE RECORD AND PROCEEDINGS
TO BE INSERTED IN THE RECORD ON
APPEAL.

To the Defendant Above Named, and to Its Attorneys of Record, and to the Clerk of the Above Entitled Court:

Plaintiffs in the above entitled action hereby designate the following additional portions of the record and proceedings for inclusion in the record on appeal.

Plaintiffs' motion to make additional findings. Filed June 18, 1949.

Court order or decision on plaintiffs' motion to make additional findings; if there be no order or decision thereon, then the Certificate of the Clerk to that effect.

Defendant's motion to re-open final judgment, and to take additional testimony. Filed July 20, 1949.

Court order or decision on defendant's motion to re-open final judgment and to take additional testimony; if there be no order or decision thereon, then the certificate of the Clerk to that effect.

Order granting motion of plaintiffs to file certified copy of decision of the Secretary of the Interior on appeal from the Bureau of Land Management. Filed March 3, 1949.

Certified copy of decision of the Secretary of the

Interior on appeal from the Bureau of Land Management. Filed March 3, 1949. [440]

This designation of additional portions of the record and proceedings in record on file.

THOMAS C. COLTON,
H. L. MAURY,
A. G. SHONE,
Attorneys for plaintiffs.

Service of the foregoing Designation of Additional Portions of the Record and Proceedings in the record on appeal, and receipt of a true copy of same is hereby acknowledged this 27th day of September, 1949.

RECONSTRUCTION
FINANCE CORPORATION,
Appellant.

By JOHN B. TANSIL.
FRANKLIN A. LAMB.
JOHN F. COTTER.
A. DEVITT VANECH.

[Endorsed]: Filed Sept. 27, 1949. [441]

[Title of District Court and Cause.]

ORDER

Plaintiff's Exhibit No. 1, and Plaintiff's Exhibit No. 2, having heretofore been introduced in evidence in the above-entitled cause, at the trial thereof, and having been by the defendant, Reconstruction Finance Corporation, designated for inclusion in the

Record on Appeal herein, and good cause now appearing therefor,

It Is Hereby Ordered that said Plaintiff's Exhibit No. 1, and Plaintiff's Exhibit No. 2, be transmitted by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit, for inclusion in the Record on Appeal herein.

Dated this 10th day of October, 1949.

CHARLES N. PRAY,
United States District Judge For The District Of
Montana.

[Endorsed]: Filed, entered October 10th, 1949.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States for the District of Montana, do hereby certify that the annexed and foregoing volume consisting of 444 pages, numbered consecutively from 1 to 444 inclusive, constitutes a full, true and correct transcript of all portions of the record in case Number 871, May Paula Mouat, et al., Plaintiffs, versus Reconstruction Finance Corporation, Defendant, designated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that at the date of this certificate,

no order or decision has been filed or entered on the Defendant's Motion to re-open final judgment and to take additional testimony, in the aforesaid case; and that no order or decision has been entered or filed, at the date of this certificate, on plaintiff's motion to make additional findings in said case.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, original exhibits Nos. 1 and 2, which were offered by the plaintiff and received in evidence at the trial of said cause, and which are designated by the defendant as part of the record on appeal herein.

I further certify that the costs of the annexed transcript of record on appeal amount to the sum of Eighty and 20/100 Dollars and have been made a charge against the United States of America for the reason that no cash fees can be collected from the defendant, the Reconstruction Finance Corporation, herein, it being an agency of the United States of America.

Witness my hand and the seal of said Court at Great Falls, Montana, this 20th day of October, A. D. 1949.

H. H. WALKER,
Clerk as aforesaid.

[Seal] By /s/ C. G. KEGEL,
Deputy. [444]

[Endorsed]: No. 12389. United States Court of Appeals for the Ninth Circuit. Reconstruction Finance Corporation, a corporation, Appellant, vs. May Paula Mouat and M. W. Mouat, wife and husband and May Paula Mouat, as trustee of an express trust, Appellees, and May Paula Mouat and M. W. Mouat, wife and husband and May Paula Mouat, as trustee of an express trust, Appellants, vs. Reconstruction Finance Corporation, a corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed October 24, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12389

RECONSTRUCTION FINANCE CORPORATION,

Appellant,

vs.

MAY PAULA MOUAT, ET AL.,

Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF THE PORTIONS OF THE
RECORD TO BE PRINTED.

The Reconstruction Finance Corporation, appellant in the above-entitled cause, adopts the statement of points filed in the district court as the statement of points to be relied upon in this Court, and desires that of the record as filed by it and certified there should be printed everything but Plaintiffs' Exhibits No. 1 and No. 4.

RECONSTRUCTION
FINANCE CORPORATION,
Appellant.

By /s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ JOHN F. COTTER,
Attorney, Department of
Justice, Washington, D. C.

[Endorsed]: Filed Nov. 3, 1949.

In the District Court of the United States in and
for the District of Montana

No. 871

MAY PAULA MOUAT, et al,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION.

This cause was duly called for hearing this day on plaintiffs' Motion to make additional findings, and on defendants' motion to re-open Final Judgment and to take additional testimony.

Mr. H. L. Maury and Mr. A. G. Shone were present and appeared for the plaintiffs, and Mr. Franklin A. Lamb was present and appeared for the defendant, Reconstruction Finance Corporation.

Thereupon the motions were duly argued by counsel for respective parties, whereupon Court ordered that briefs or memorandums of authorities be filed thereon. The plaintiffs were granted twenty days from today within which to file their brief or memorandum of authorities in support of their motion to make additional findings, and the defendant Reconstruction Finance Corporation was granted twenty days after receipt of copy of plaintiffs' brief or memorandum, within which to file its brief on said motion.

Thereupon the defendant was granted twenty days from today within which to file its brief in support of its motion to re-open the Final Judgment

herein, and the plaintiffs were granted twenty days after receipt of copy of defendant's brief, within which to file their brief in answer thereto, and that upon the filing of the last brief, or the expiration of the time allowed therefor, the said motions shall be considered as submitted and by the Court taken under advisement.

Thereupon, on motion of Mr. H. L. Maury, counsel for plaintiffs, it is ordered that the plaintiffs be and are granted thirty-five days from and after receipt of notice of completion of the record on the appeal taken by the Reconstruction Finance Corporation herein, within which to prepare their record on appeal.

Entered in open Court at Great Falls, September 27, 1949.

H. H. WALKER,

Clerk,

By C. G. KEGEL,

Deputy.

In the District Court of the United States, in and
for the District of Montana, Billings Division

Civil Action No. 871

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and MAY PAULA MOUAT, as
Trustee of an express trust,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation,

Defendant.

ORDER DENYING MOTION TO RE-OPEN
FINAL JUDGMENT

The motion of defendant to re-open final judgment and take additional testimony was submitted on briefs of counsel for the respective parties which have been given consideration by the court with the result that the court, being now duly advised, is of the opinion that the motion should be denied, and such is the order of the court herein.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered Nov. 7, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO MAKE
ADDITIONAL FINDINGS

Motion by plaintiff in the above entitled cause to make additional findings therein and thereby increase the amount of the judgment, came on regularly for hearing on briefs submitted by counsel for the respective parties, and the court having considered the same and being duly advised, and good cause appearing therefor, is now of the opinion that the said motion should be overruled and denied, and such is the order of court herein.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered Nov. 7, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL BY PLAINTIFFS

Notice Is Hereby Given, that May Paula Mouat and M. W. Mouat, wife and Husband, and May Paula Mouat, as trustee of an express trust, being plaintiffs above named, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from parts of the final judgment entered in this action on June 11, 1949, as follows:

1.

That portion of said judgment wherein "It is adjudged that defendant, Reconstruction Finance Corporation, is the owner, and entitled to the possession of all houses, buildings, or structures situated, and being upon the Lake Placer Mining Claim and without requirement of immediate removal."

2.

Wherein the said judgment fails to adjudicate that the said plaintiffs were entitled to a judgment for any sum of money at all for waste as to the removal and conversion of the plumbing fixtures of buildings on the Lake Placer, and other strip and waste by destruction of buildings, removal of fixtures, removal of buildings, and all waste committed at the leased premises by defendant.

3.

Wherein the said judgment fails to adjudicate that the plaintiffs were entitled to Six Hundred Dollars each, or any sum, whatever, for the destruction of twenty-two residence buildings on the said Lake Placer.

THOMAS C. COLTON,

LOWNDES MAURY,

A. G. SHONE,

Attorneys for plaintiffs and
cross appellants.

[Endorsed]: Filed Nov. 21, 1949.

In the United States Court of Appeals
For the Ninth Circuit

Civil Action No. 871

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation,

Appellant,

vs.

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and May Paula Mouat as trustee
of an express trust,

Appellees.

Also, MAY PAULA MOUAT and M. W. MOUAT,
wife and husband, and MAY PAULA MOUAT
as trustee of an express trust,

Appellants,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation,

Cross-Appellees.

STATEMENT OF POINTS TO BE RELIED ON
BY PLAINTIFFS' CROSS APPEAL

The written lease from plaintiffs to Reconstruc-
tion Finance Corporation (Metals Reserve Com-
pany), provided: (a) "Upon the termination of
this lease for any reason by either party, lessee shall
have six (6) months additional time to remove from
the leased premises its personal property and its

tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties, and all excavations, foundations, wooden mine structures, wooden tramway towers, and wooden buildings erected upon the demised premises * * *". Lessee terminated the lease by written notice February 28, 1946; there were then standing on the leased premises 81 wooden buildings with plumbing and lighting fixtures; before August 28, 1946, lessee extracted and converted plumbing and fixtures from all these buildings, and converted same to its own use.

Cross appellants assert that the Court erred in finding that these buildings were the property of Reconstruction Finance Company after February 28, 1946.

2.

Cross-appellants assert that the Court erred in not giving them judgment for at least the lowest value named in the evidence of 22 of these buildings removed by lessee before suit brought, to-wit: \$400.00 for each, total \$8,800.00.

3.

Cross-appellants assert that the Court erred in not giving them judgment for at least the lowest value of the plumbing and other fixtures removed by lessee after February 28, 1946, and before complaint filed, September 17, 1946, i.e., \$11,795.52.

4.

The lease provided that it should be construed by

Montana Law. The Court erred in not giving the landlords judgment for \$90,000.00, the lowest estimate in the evidence of the necessary cost of replacement of the plumbing and fixtures in the buildings.

5.

This suit was commenced more than six months after lessee terminated the lease; 81 buildings (though fixtures extracted) were standing on the premises at the trial. The lease provided: "20. Lessee agrees with lessors that unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased, upon the termination thereof, for a period of six months after such termination, shall conclusively be deemed to have been abandoned by the lessee in favor of the lessors."

The Court erred in adjudging that these buildings were not the property of cross-appellants.

6.

The Court erred in permitting the lessee to introduce evidence by parol to vary or explain the written contract, for that it is plain on its face; for that neither its validity, as written, nor any variance from its plain meaning, was put in issue in the answer.

7.

The Court erred in permitting the lessee to introduce evidence to impair or dispute the lessors' title to the Lake Placer, one of the 21 mining claims demised.

8.

The Court erred in not finding more fully on the facts as requested in cross-appellants' motion so to do, served and filed within 10 days after entry of judgment, to-wit:

9.

The Court erred in not finding specially that the defendant did not leave intact the foundations or wooden buildings upon the demised land, but while wrongfully holding possession from plaintiffs after March 1st, 1946, and previous to September 1, 1946, without plaintiffs' consent, tore out from, and stripped the said buildings of all plumbing in place, some wiring in place, some doors and windows and oil storage tanks in place, and pipes appurtenant, and carried off of the demised land the said plumbing, wiring, oil storage tanks, piping, doors and windows, and converted the same to its use.

10.

The Court erred in not finding specially that the reasonable and necessary costs of replacing the said plumbing, wiring, doors, windows, oil storage tanks, and pipes appurtenant thereto, was, and is the sum of Ninety Thousand (\$90,000) Dollars.

11.

The Court erred in not finding specially the defendant, without plaintiffs' consent, between March 1st and September 1st, 1946, removed from the leased premises, and converted to its use, one house of the value of \$600.00.

12.

The Court erred in not finding specially that the defendant, without plaintiffs' consent, permitted a third party, after September 1st, 1946, and before the hearing herein, to remove and convert to its own use, and such third party did remove and convert to its own use, and use of said defendant, from said premises, twenty-one houses of the value of Seven Hundred (\$700) Dollars each—a total of Fourteen Thousand, Seven Hundred (\$14,700) Dollars.

THOMAS C. COLTON,
H. L. MAURY,
A. G. SHONE,

Attorneys for cross-
appellants.

[Endorsed]: Filed Nov. 25, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Defendant, Reconstruction Finance Corporation a Corporation, and to Its Attorneys of Record, and to the Clerk of the Above Entitled Court:

May Paula Mouat and M. W. Mouat, wife and husband, and May Paula Mouat as trustee of an express trust, having on the 21st day of November, 1949, filed their Notice of Appeal to the United

States Court of Appeals for the Ninth Circuit from parts of the final judgment entered in the above entitled action on June 11, 1949, do hereby adopt by reference, the record on appeal designated by defendant, Reconstruction Finance Corporation, a corporation, and the additional portions of the record on appeal designated by plaintiffs herein, and plaintiffs and cross-appellants hereby designate in addition thereto the following portions of the record and proceedings for inclusion in the record on appeal, to-wit:

1. The Clerk's Minute Entry of September 27, 1949, showing that the motion of Reconstruction Finance Corporation, a corporation, to re-open final judgment and take additional testimony, was on said day, in open court, argued by counsel, and submitted to the court on briefs, and by the Court taken under advisement.

2. The Clerk's Minute Entry of September 27, 1949, showing that the Motion of May Paula Mouat and M. W. Mouat, wife and husband, and May Paula Mouat, as trustee of an express trust, to make additional findings, and thereby increase the amount of the judgment in this action, was, on said day, in open court argued by counsel, and submitted to the Court on briefs, and by the Court taken under advisement.

3. Order of November 7th, 1949, denying the Motion of defendant, Reconstruction Finance Corporation, a corporation, to re-open final judgment and take additional testimony.

4. Order of November 7, 1949, denying the Motion of plaintiffs to make additional findings, and thereby increase the amount of the judgment herein.

5. Plaintiffs' Notice of Appeal filed November 21, 1949, and Certificate of the Clerk showing that an Undertaking on Appeal has been filed by plaintiffs.

6. Statement of Points on which plaintiffs and cross-appellants intend to rely.

7. This designation of the additional contents of the record on appeal.

THOMAS C. COLTON,

H. L. MAURY,

A. G. SHONE,

Attorneys for plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 25, 1949.

[Title of District Court.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the annexed and foregoing volume, consisting of 12 pages, numbered consecutively from 1 to 12 inclusive, constitutes a true and correct transcript of all portions of the record in case numbered 871, May Paula Mouat, et al. vs. Reconstruction Finance Corporation, a corporation, designated by the parties as the supplemental record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said Supplemental Transcript of Record amount to the sum of nine and 40/100ths (\$9.40) Dollars, and have been paid by the plaintiffs and cross-appellants.

Witness my hand and the seal of said Court at Great Falls, Montana, this 12th day of December, A. D. 1949.

H. H. WALKER,
Clerk as aforesaid.

[Seal] By /s/ C. G. KEGEL,
Deputy.

[Endorsed]: No. 12389. United States Court of Appeals for the Ninth Circuit. May Paula Mouat and M. W. Mouat, wife and husband, and May Paula Mouat, as trustee of an express trust, Appellants, vs. Reconstruction Finance Corporation, a corporation, Appellee. Transcript of Record on Cross-Appeal. Appeal from the United States District Court for the District of Montana.

Filed December 19, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 12,389

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and MAY PAULA MOUAT as
trustee of an express trust,

Appellees.

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and MAY PAULA MOUAT as
trustee of an express trust,

Cross Appellants,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Cross Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF THE PORTION OF THE REC-
ORD TO BE PRINTED ON CROSS
APPEAL

May Paula Mouat and M. W. Mouat, wife and
husband, and May Paula Mouat as trustee of an
express trust, cross appellants, adopt the statement
of points filed by them in the District Court as

the statement of points to be relied upon in this Court, and desire that the entire record as filed by them and certified by the District Court Clerk to this Court should be printed, and also this adoption of statement of points and designation should be printed.

MAY PAULA MOUAT and M. W. MOUAT, husband and wife, and MAY PAULA MOUAT, as trustee of an express trust,

Cross Appellants,

By THOMAS C. COLTON,

M. L. MAURY,

A. G. SHONE,

Their Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 19, 1949.

In the United States Court of Appeals
for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION,
APPELLANT

v.

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLEES

and

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLANTS

v.

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION,
APPELLEE

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION, APPELLANT

A. DEVITT VANECH,
Assistant Attorney General.

JOHN B. TANSIL,
United States Attorney,
Billings, Montana.

JOHN F. COTTER,
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Washington, D. C.

FILED
FEB. 16 1950

PAUL P. O'BRIEN,

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,389

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION,
APPELLANT

v.

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND,
AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLEES

and

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND,
AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLANTS

v.

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION,
APPELLEE

*UPON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA*

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION,
APPELLANT

OPINION BELOW

The opinion of the district court (R. 357-367) is not reported.

(1)

JURISDICTION

This is an appeal from a judgment entered June 11, 1949 (R. 391-397). On August 9, 1949, the Reconstruction Finance Corporation filed notice of appeal (R. 403). The jurisdiction of the district court rests upon sec. 3 of the Act of January 22, 1932, 47 Stat. 5, as amended, 15 U. S. C. sec. 603, and sec. 12 of the Act of February 13, 1925, 43 Stat. 941, 28 U. S. C. sec. 42, now 28 U. S. C. sec. 1349. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether an order of the War Production Board directing cessation of mining and milling operations on land leased to a wholly owned government corporation compelled the corporation to cease these operations and thus—as the lease provided—relieved it of the obligation to pay a minimum royalty.

2. Whether damages for continuing to occupy land after termination of a lease are to be measured by a minimum royalty paid as compensation not only for occupancy of the land but also for the right to extract the minerals it contains.

3. Whether the Reconstruction Finance Corporation is liable for the occupancy of property occurring after it has been succeeded as occupant by the United States acting through the War Assets Administration.

STATEMENT

The provisions of the judgment below (R. 391-397) to be reviewed on this appeal award appellees (a) \$21,-166.66 for minimum royalties held to be due for the period January 1, 1944-March 1, 1946, by virtue of a lease that was terminated on the latter date, and (b) \$17,055.44, held to be the reasonable rental value of the leased property from termination of the lease to

the date of trial, i.e., from March 1, 1946, to November 14, 1947.

The lease in question was granted by appellees to the Metals Reserve Company. By section 5 of the Act of June 25, 1940, 54 Stat. 573, appellant, the Reconstruction Finance Corporation, had been authorized—

(2) When requested by the Federal Loan Administrator, with the approval of the President, to create or to organize a corporation or corporations, with power (a) to produce, acquire and carry strategic and critical materials as defined by the President, (b) to purchase and lease land, to purchase, lease, build, and expand plants, and to purchase and produce equipment, supplies, and machinery, for the manufacture of arms, ammunition, and implements of war, (c) to lease such plants to private corporations to engage in such manufacture, and (d) if the President finds it is necessary for a Government agency to engage in such manufacture, to engage in such manufacture itself. * * *

Three days later, pursuant to this authority, appellant created the Metals Reserve Company. 6 F. R. 2970. The principal office was at Washington, D. C., and all the capital stock was subscribed for by appellant. This was done for the purpose of acquiring and carrying a reserve supply of critical and strategic materials.

The lease (Ex. A, R. 14-36) was made December 20, 1941. It covered three patented and 25 unpatented lode and placer mining claims (R. 15-18). In addition to exclusive possession, Metals Reserve Company was granted "the right to explore, mine and extract and remove from said leased mining claims chromite or other chromium bearing ores and any other minerals, metals, precious stones or rocks found in, on or under said leased premises * * * (par. 1, R. 18).

An advance royalty of \$10,000 was payable on or before February 1, 1942 (par. 2, R. 19). Extracted min-

erals were to be paid for at specified rates (par. 3, R. 19-21). Beginning January 1, 1943, a minimum annual royalty of \$10,000 was to be paid in quarterly instalments (par. 7, R. 23-24). However—

should Lessee's construction or development or mining or milling operations or any other operation hereunder be suspended because of any of the causes or reasons set forth in Paragraph 24 hereof Lessee's obligation to pay a minimum royalty as aforesaid shall be suspended during any and all periods where such causes or reasons exist and the obligation to pay such minimum royalty shall be reduced in such proportion as the period of suspension of operations bears to the entire calendar year.

Paragraph 24 declared (R. 30-31):

Anything in this lease contained to the contrary notwithstanding, any * * * requirement, regulation, restriction or other act of any government or governments, whether legal or otherwise * * * force majeure, * * * and any other contingency, whether or not of the nature or character hereinbefore specifically enumerated, which is beyond the control of Lessee or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist.

The lease accorded lessors free access to the premises so that they might examine into production and the records thereof (R. 25-26). They could cancel for lessee's failure to pay royalties (par. 13, R. 27-28).

If default is made, * * * then Lessors may serve notice on Lessee demanding that payment be made within thirty days, and if payment is not made and the default remedied within thirty days after receipt of said notice by Lessee, Lessors may forthwith declare this lease terminated and ended and

the Lessors shall then be entitled immediately to re-enter and take possession of the demised premises * * *.

On the other hand, the lessee could terminate the lease on 90 days' notice and payment of \$1000 (par. 14, R. 28). If not terminated, the lease was to endure 10 years (R. 18).

So much for the terms of the lease. Metals Reserve Company employed the Anaconda Mining Company to develop and operate the property. For this purpose the Defense Plant Corporation¹ under Plancor No. 587 provided funds in excess of \$8,000,000.² The \$10,000 advance royalty was paid (R. 50). As a result of mining and milling operations during 1943, royalties pursuant to paragraph 3 of the lease exceeded the minimum royalty due for that year (R. 39). Before any more royalties were due, payments ceased. *They ceased because, complying with an order of the War Production Board, the lessee ceased to mine the leased premises.*

At this point, it is appropriate to set out the authority of the War Production Board to make such an order and the facts establishing that it did so.

The War Production Board had been established by the President on January 16, 1942, Executive Order No. 9024, 7 F. R. 329. The full text of the Order is printed in the Appendix, pp. 24-26, *infra*. Section 2 thereof provided that the Chairman should "(a) Exercise general direction over the war procurement and pro-

¹ Defense Plant Corporation was created by appellant on August 22, 1940. 6 F.R. 2971. Its organization was also authorized by section 5 of the Act of June 25, 1940, 54 Stat. 573.

² "Plancor" was the term used by Defense Plant Corporation to designate the projects built or financed by it. For identification, each Plancor was given a number. Plancor No. 587 comprised the mine and mill transmission lines, an access road and auxiliary facilities including dwellings (R. 281; see also Fdg. XIII, R. 386-387). The improvements are listed in detail in Ex. 20, R. 194-197.

duction program” and “(b) Determine the policies, plans, procedures and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production * * * and issue such directives in respect thereto as he may deem necessary or appropriate.” Section 3 directed that: “Federal departments, establishments and agencies shall comply with the policies, plans, methods and procedures in respect to war procurement and production as determined by the Chairman * * *.” Section 5 stated: “The Chairman may exercise the powers, authority and discretion conferred upon him by this Order through such officials or agencies * * * as he may determine * * *”.

On February 24, 1942, by Executive Order No. 9071, the President had transferred to the Department of Commerce, to be administered under the direction of the Secretary of Commerce, the functions, powers and duties of the Metals Reserve Company (Ex. 16, R. 186-188, 7 F. R. 1531).³ And on July 5, 1943, the Chairman of the War Production Board had instructed the Secretary to accept the signature of Mr. Hiland G. Batcheller as Operations Vice Chairman “on recommendations that are made by the War Production Board to the [appellant] and its subsidiaries” (Ex. 14, R. 176).

The order of the War Production Board requiring Metals Reserve Company to stop mining and milling operations on the leased properties was in the form of a letter, dated September 13, 1943, from Mr. Batcheller to the Secretary (Ex. 7, R. 160-164). Mr. Batcheller pointed out that the development of Montana chromite deposits had been undertaken when enemy activity

³ The Honorable Jesse H. Jones was Secretary of Commerce. He was also chairman of the board of directors of Metals Reserve Company, the lessee, and of Defense Plant Corporation, which financed the development of the leased premises.

had threatened to cut off our usual foreign sources of supply of chromite. He went on to say:

It should be noted that the Montana chrome concentrates are very much inferior to imported grades of chromite. * * * We view the Montana chromite development now only as insurance against some future emergency * * *.

The letter concluded (R. 163-164):

In view of the present stringent manpower situation and the lack of need for Montana concentrates as outlined above, we believe it advisable to divert the men now employed in mining low grade concentrates in Montana into the production of more critically needed materials such as copper and zinc. We, therefore, request that you shut down all operations at the Benbow and Mouat-Sampson properties except for such maintenance men as are necessary to keep both mines and mills in sufficiently good condition so that either or both operations could be revived in the event that the chromite picture should change for the worse.

Accordingly, on September 16, 1943, lessee wired the Anaconda Copper Mining Company to: "Close down Mouat mine as quickly as orderly transfer of personnel to more critical mineral production will permit with view of stopping milling approximately November first" (Ex. 17, R. 189-190; see also R. 190-194).

On December 11, lessee notified appellees of the order of the War Production Board (Ex. 13, R. 174-175). Its letter concluded:

As you know, Metals Reserve Company, as a federal agency created to aid the Government of the United States in the national defense program and war effort, is obligated to comply with the policies, plans, methods and procedures in respect to war procurement and production as determined by the Chairman of the War Production Board. Under

the circumstances Metals Reserve Company has complied with the above mentioned directive and has suspended all operations in and about the premises covered by the above mentioned lease and commonly known as the "Mouat-Sampson properties". A crew of men is being maintained to protect the property.⁴

Operations were never resumed. On October 6, 1944, the War Production Board, in a letter to the Secretary of Commerce signed by Philip D. Wilson who had succeeded to the duties of Mr. Batcheller (Ex. 14, R. 179), directed that the Mouat-Sampson properties be continued in standby condition (Ex. 9, R. 166-167).⁵ On April 14, 1945, the Board notified the appellant that the property of Plancor No. 587 was no longer necessary for the war effort (Ex. 11, R. 168-170) and on November 2, 1945, it recommended that appropriate action be taken in respect of the lease (Ex. 12, R. 170-171). Accordingly, under date of November 15, 1945, appellant notified appellees that the lease was cancelled as of February 28, 1946 (Ex. 15, R. 184-185).⁶ Thereafter, appellant declared the property surplus (Ex. 20, R. 194-197; R. 281) and on August 31, 1946, it was notified that: "The United States of America, acting by and through the

⁴ On April 8, 1944, lessee again wrote to appellees. Apparently, the letter was provoked by an inquiry from appellees as to when they might expect payment of minimum royalty. Appellees were reminded that on December 11, 1943, they had been notified that operations on the properties had been suspended and consequently that lessee had been relieved of the obligation to pay minimum royalty (Ex. 13, R. 172-173).

⁵ An earlier letter, dated March 8, 1944, was to the same effect. Ex. 8, R. 164-165. See also a subsequent letter, dated February 24, 1945. Ex. 10, R. 167-168.

⁶ By the Act of June 30, 1945, 59 Stat. 310, the Metals Reserve Company (as well as the Defense Plant Corporation and certain other corporations created by the Reconstruction Finance Corporation) was dissolved and all its functions, powers, duties and authority, together with its assets and liabilities, were transferred to Reconstruction Finance Corporation.

War Assets Administrator hereby accepts the custody, protection and maintenance of Plancor 587 * * * as of the close of business this day," (Ex. 22, R. 208; see also R. 209-211).

On September 17, 1946, appellees commenced this suit, naming as defendants the appellant and the War Assets Administration (R. 2-14). So far as here material, the complaint alleged a failure to pay minimum royalties for the period beginning January 1, 1944, and ending February 28, 1946, and retention of possession of the leased premises since the latter date. A motion to dismiss the War Assets Administration on the ground it was not subject to suit (R. 36) was granted (R. 44-45). The cause was tried by the district judge without a jury (R. 46-357). The greater part of the testimony was devoted to matters not involved on this appeal: the condition of dwellings constructed by lessee on the leased premises (R. 69-79, 84-136, 137-139, 233-240, 260-279) and the circumstances under which the lease was negotiated (R. 212-230, 294-309).

In addition appellees testified that they lived near the leased property (R. 50, 141) and that during the period of the lease Malcolm Mouat had been often upon them (R. 69-70, 141, 143, 155). They testified also that after March 1, 1946, the date the leases terminated, the road built by lessee from the entrance to the mine site was guarded and that they could not enter without showing the passes which had been issued to them (R. 53, 63, 83). This road was the only passageway through the premises for automobiles (R. 52, 143, 242). Appellees further testified that at one point a chain was stretched across the road (R. 51, 57). *They offered no testimony as to the fair rental value of the premises.*

Appellant introduced—with cognate documents—the War Production Board order of September 13, 1943, closing down mining and milling operations, the Metals

Reserve Company letter of December 11, 1943, notifying lessors of the order and the consequent suspension of mining and milling operations, the letter of November 15, 1945, canceling the lease, and the letter of August 31, 1946, notifying appellant that the United States had taken over maintenance, custody and control of the property on the leased premises. In addition testimony was offered to show that entrance to the premises was restricted for the purpose of guarding government property and keeping out those having no business on the premises (R. 241, 248, 289). Witnesses for appellant expressed the opinion that the mine could not profitably operate (R. 230-231) and had no commercial value (R. 240).

On June 11, 1949, the judge made findings of fact (R. 378-389) which—insofar as they are acceptable to appellant—merely summarized the foregoing. In addition, he found:

VII. The defendant failed to introduce sufficient evidence at the trial to show that any act occurred sufficient to relieve the defendant, or its predecessor, the Metals Reserve Company, from the duty to pay minimum royalty under paragraph 24, and the burden of proof as hereafter found in Conclusions of Law, is upon the defendant to show absolution by reason of any exception set out in paragraph 24 of the lease. Lessee agreed in the lease to carry on “its operations diligently.” (R. 384).

XVIII. That the reasonable rental value of the premises described in the lease agreement, during the period from March 1, 1946, to the conclusion of the trial, November 14, 1947, was, and is, the reasonable sum of Ten Thousand (\$10,000) Dollars per year. (R. 388).

Accordingly, he entered judgment that appellees recover from appellant \$21,666.66 on account of minimum

royalties and \$17,055.44 for occupancy of the premises from March 1, 1946, to the end of the trial.

SPECIFICATIONS OF ERROR

1. The district court erred in finding as follows :

VII. The defendant failed to introduce sufficient evidence at the trial to show that any act occurred sufficient to relieve the defendant, or its predecessor, the Metals Reserve Company, from the duty to pay minimum royalty under paragraph 24, and the burden of proof as hereafter found in Conclusions of Law, is upon the defendant to show absolution by reason of any exception set out in paragraph 24 of the lease. Lessee agreed in the lease to carry on its operations diligently.

2. The district court erred in finding as follows :

X. The lease provided that upon the termination, lessee should surrender peaceably the leased premises and appurtenances in good order with the maintenance of possessory claims and rights and permits fully met, and that lessors should have the right to re-enter upon the leased premises owned by them, and appurtenances, and take full and complete possession of the whole thereof. That the lessee has not surrendered the said premises, or any part thereof, to the lessors ; that lessee, by show of force, and armed guards and servants in possession, has wrongfully withheld the possession of the said premises, and all thereof, from the plaintiffs, and this up to the conclusion of the evidence in this case, towit : November 14th, 1947.

3. The district court erred in finding as follows :

XIV. The amount equalling the minimum rental due and unpaid during the period the defendant has held wrongfully the premises from March 1st, 1946, until the trial, is Seventeen Thousand, Fifty-five and 44/100 (\$17,055.44) Dollars.

4. The district court erred in finding as follows:

XVIII. That the reasonable rental value of the premises described in lease agreement, during the period from March 1, 1946, to the conclusion of the trial, November 14, 1947, was, and is, the reasonable sum of Ten Thousand (\$10,000) Dollars per year.

5. The district court erred in holding that appellant was liable for minimum royalties from January 1, 1944, to February 28, 1946, pursuant to the agreement of December 20, 1941.

6. The district court erred in holding that appellant was liable to appellee at the rate of \$10,000 a year for occupancy of the leased premises from March 1, 1946, to November 14, 1947.

7. The district court erred in entering judgment for appellee in the sum of \$38,722.10 with interest.

SUMMARY OF ARGUMENT

I

The trial court erred in holding appellant liable for minimum royalty after January 1, 1944. The obligation to pay minimum royalty was suspended if mining and milling operations were suspended by government order. The trial court found (VII, R. 384) that appellant "failed to introduce sufficient evidence * * * to show that any act occurred sufficient to relieve" lessee, Metals Reserve Company, of the duty to pay minimum royalty. There is no support for this finding. The War Production Board letter of September 13, 1943, to the Secretary of Commerce from H. G. Batcheller (Ex. 7, R. 160-164) was a government order compelling lessee to cease mining and milling operations.

Executive Order No. 9024 (Appendix, pp. 24-26, *infra*) gave the Chairman of the War Production Board

power to determine the policies, plans, procedures and methods of the several Federal Departments, establishments and agencies in respect of the war procurement and production program. Among these agencies was lessee. The Chairman had delegated Mr. Batcheller to act for him and the Secretary of Commerce was in charge of lessee. The order therefore was legally indistinguishable from one signed by the Chairman and directly addressed to lessee. Its force or effect was not impaired by the circumstance that the Board chose to "request" rather than to "instruct" or "direct".

Although the trial court did not find to the contrary, the letter from lessee to lessors dated December 11, 1943, stating that lessee "has suspended" all operations (Ex. 13, R. 174-175) constitutes affirmative evidence that operations ceased before January 1, 1944. *This statement has never been challenged and cannot be.* There was no reason for lessee to misrepresent the fact. But, had it done so, appellees—who knew the truth—would have so testified.

II

Similarly, the trial court erred in finding (XVIII, R. 388) that from March 1, 1946 (when the lease terminated) until November 14, 1947, the premises described in the lease had a fair rental value of \$10,000 a year. There is no evidence to support this finding. Appellees introduced no evidence on the matter and appellant's witnesses testified the premises had no rental value.

In fixing rental value at the minimum royalty, the court overlooked the facts that the minimum royalty was compensation for the grant to lessee of the right to extract minerals and that, when the lessee had no right to extract minerals, it could occupy the property without charge.

After the lease terminated, appellant did not claim—or exercise—the profit *a prendre*. As this Court has held, mere possession of mineral-bearing land does not carry with it a right to extract the minerals and so does not make the occupant liable to the owner for the value of that right. *O'Connor v. United States*, 155 F. 2d 425 (1946). Obviously, therefore, the amount which would be exacted for a profit *a prendre* has no tendency to indicate what could be obtained from one merely occupying the land.

III

In any event, the trial court erred in holding appellant liable for occupancy after August 31, 1946. Appellant's occupation ended on that day when the United States, acting through the War Assets Administration, took "custody, protection and maintenance" (Ex. 22, R. 208). As this Court has held (*United States v. Shofner Iron & Steel Works*, 168 F. 2d 286) the United States thereby took possession of the property and appellant retained merely a barren legal title for the use of the United States. The latter—if anyone—is chargeable for subsequent occupancy.

ARGUMENT

I

The Obligation to Pay Minimum Royalties After 1943 Was Suspended by the War Production Board Order of September 13, 1943

The lease suspended the obligation to pay minimum royalty in the event mining or milling operations ceased for any of the reasons set forth in paragraph 24. Among the reasons set forth in paragraph 24 were "any * * * requirement, regulation, restriction or other act of any government." In other words, if mining and milling operations were prohibited by government order, the

obligation to pay minimum royalties was suspended. The trial court, however, said that it could not "find sufficient evidence of an order from one in authority to the lessee or successor calling for a cessation of operations under the lease and fixing the time and circumstances when such an event would take place." (R. 360). Thus it found that appellant "failed to introduce sufficient evidence * * * to show that any act occurred sufficient to relieve" the lessee of the duty to pay minimum royalty (Fdg. VII, R. 384).

There is no support whatever for this finding. As the Statement shows (pp. 6-7, *supra*) the War Production Board letter of September 13, 1943, addressed to the Secretary of Commerce and signed by Mr. H. G. Batcheller (Ex. 7, R. 160-164) compelled lessee to cease operations on the leased property.

The power of the Board—or its Chairman—to order the cessation of operations cannot be questioned. Executive Order No. 9024 (Appendix, pp. 24-26, *infra*) establishing the Board gave its Chairman general direction of the war procurement and production program, directed him to determine the policies, plans, procedures and methods of the several Federal Departments, establishments and agencies in respect of that program and to issue appropriate directives (sec. 3) and—to emphasize the mandate—ordered the Federal Departments, establishments and agencies to comply with the Chairman's determinations (sec. 4). Among these agencies was the Metals Reserve Company, created by the Reconstruction Finance Corporation by authority of Congress and wholly owned by the United States (6 F. R. 2970).

It is equally plain that the Board issued an order to Metals Reserve. The Chairman, empowered to act through agents chosen by him (sec. 5, Exec. Order No. 9024), had instructed the Secretary of Commerce to ac-

cept the signature of Mr. Batcheller on recommendations made by the Board to Metals Reserve (Ex. 14, R. 176). This instruction was directed to the Secretary because he had charge of the Metals Reserve (Ex. 16, R. 186-188). Thus, the letter of September 13, 1943, from Mr. Batcheller, the agent of the Chairman of the War Production Board, to the Secretary of Commerce, controlling the Metals Reserve Company, is legally indistinguishable from one signed by the Chairman of the War Production Board and directly addressed to Metals Reserve—or to Mr. Jones in his other role as chairman of that board of that company. See *United States v. Phelps*, 40 F. 2d 500 (C. C. A. 2, 1930); *Cooper v. O'Connor*, 99 F. 2d 135 (App. D. C., 1938), certiorari denied 305 U. S. 643.

The letter compelled Metals Reserve Company to cease mining and milling operations of the leased property. After showing the inadvisability of continuing production, it said: "We, therefore, request that you shut down all operations." The Board had determined on a shut-down. It transmitted this decision to the official who controlled the lessee, the Secretary of Commerce. That official was under compulsion to obey the decision. In this context, the circumstance that the Board chose to "request" rather than to "instruct" or "direct" does not impair the force or effect of the order. See e.g., *Estate of Lawrence*, 17 Cal. 2d 1, 7, 108 P. 2d 893 (1941). "A request from one in authority is understood to be a mere euphemism; it is in fact a command in an inoffensive form." *State v. Scheve*, 65 Neb. 853, 880, 93 N. W. 169 (1902). Indeed, the choice of this form of expression was particularly appropriate in view of the fact that the direction was addressed to a cabinet officer.

It is therefore clear that the trial court failed to give effect to the War Production Board letter of September

13, 1943, and accordingly erred in finding that the evidence did not show that beginning January 1, 1944, the lessee was relieved of the obligation to pay minimum royalty.

There are intimations in the opinion of the trial court (R. 360-361)—but not in its finding—to the effect that it was in doubt as to exactly when mining and milling operations ceased. Since the finding does not incorporate these intimations, it is evident they did not influence the court. Nonetheless, it is just as well to clear up any misgivings.

The record does not show the precise date in 1943 when operations ceased. But it does affirmatively show that the event occurred before January 1, 1944, i.e., before the beginning of the period for which minimum royalty was awarded in this suit. Thus, in its letter of December 11, 1943, Metals Reserve notified lessor that it "has suspended" all operations (Ex. 13, R. 174-175).⁷ *This statement was not questioned, much less contradicted, by lessors either then or in the complaint or at the trial.* In the nature of things it could not be challenged. In the first place it is unthinkable that the statement was an untruth. There was no reason why the Metals Reserve Company should misrepresent the fact. At a time when billions were being spent, it did not concoct a lie for the purpose of cheating lessors out of \$2500 each quarter year. In the second place, the lessors were in a position to know the facts. They lived in the neighborhood (R. 50, 61) and by the terms of the lease were given free access to the premises and the right to examine production records. Appellee Malcolm Mouat testified that, since the execution of the lease, he had

⁷ In its second letter to lessee dated April 8, 1944 (see Fn. 4, p. 8, *supra*) the lessee said: "Under date of December 11, 1943, we informed you that, pursuant to action taken by the War Production Board, operations at the [leased] properties had been suspended."

been on the property many times (R. 141, 143-144, 155). If operations had continued into 1944 and beyond, he would have known and surely would have so testified. Moreover, it is safe to suppose that long before this suit was brought he and the other lessors would have charged a default and availed themselves of the provisions of the lease calling for its termination.

It is submitted that the court below erred in holding appellant liable for minimum royalties after January 1, 1944.

II

There Is No Evidence to Support the Finding That After Termination of the Lease the Reasonable Rental Value of the Property Was \$10,000 a Year

In addition to awarding appellees minimum royalties until the termination date of the lease, the trial court gave them damages at the rate of \$10,000 a year from March 1, 1946, to November 14, 1947. It based this further award upon its finding that "the reasonable rental value of the premises described in the lease agreement * * * from March 1, 1946 to the conclusion of the trial, November 14, 1947, was, and is, the reasonable sum of Ten Thousand (\$10,000) Dollars per year" (Fdg. XVIII, R. 388). This part of the judgment is erroneous because, (1) there is no evidence to support the finding as to the fair rental value of the property and, (2) in any event appellant Reconstruction Finance Corporation cannot be liable after August 31, 1946, because as the Statement shows (pp. 8-9, *supra*) on that date the United States through the War Assets Administrator accepted "custody, protection and maintenance" of the property. The first of these points will be made under this heading of the brief and the second under the next.

As the Statement emphasized (p. 9, *supra*) appellees (whose complaint made no claim for damages

occasioned by occupation after the lease terminated) introduced no evidence as to the fair rental value of the premises. Appellant's witness testified that the property had no rental value (R. 240). In its opinion, the trial court disclosed the reasoning which led it to make Finding XVIII. It said (R. 362):

If the property was practically worthless, as asserted by defendant, it is difficult to understand how that would afford any justification for withholding possession from the lessors in violation of the express terms of the lease. As it seems to the court, the minimum royalty should stand for rental against the defendant for not complying with the terms of the lease in delivery of possession after termination thereof, and the court will so decide the issue.

The error is apparent. Of course, the fact that property is worthless does not justify a trespasser. But it is equally clear that the fact of worthlessness shows that the owner sustains only nominal injury by being kept out of possession and consequently limits the pecuniary liability of the trespasser to nominal damages. On the other hand, if an agreement has been made as to the rent to be paid for leased property, that rent fairly may be taken as evidence of the value of occupancy and may be used to measure damages for a withholding of possession after the lease terminates.

In the case at bar, however, there was no warrant for treating the "minimum royalty" as evidence of the value of occupancy of the lessors' property. In addition to that occupancy, lessors gave lessee "the right to explore, mine and extract and remove from said leased mining claims" all minerals found therein. Moreover, under the terms of paragraph seven of the lease the minimum royalty was not payable if production ceased, i.e., if the profit *a prendre* was not exercised, by reason of an event specified in paragraph 24.

In that event, lessee would pay nothing for occupying the premises. Thus—wholly apart from the question of when and in what circumstances the payment of minimum royalties would be suspended—it is evident that the lease contemplated uncompensated occupancy of the leased property. In other words, the parties were agreed that, unless the lessee had the right to exercise its profit *a prendre*, it did not profit, nor lessee lose, by its occupation of the property.

While appellant occupied the premises after the lease terminated, it did not claim (and of course did not exercise) the right to take minerals therefrom. And, as this Court has held, mere possession of mineral-bearing land does not carry with it a right to extract the minerals and consequently does not make the possessor liable to the owner for the value of that right. *O'Connor v. United States*, 155 F. 2d 425 (1946). Accordingly, appellant is not liable to the lessors for the value of a profit *a prendre*. Obviously, then, the amount which Metals Reserve Company agreed to pay for the grant of a profit *a prendre* does not show—indeed has no tendency to indicate—what rental could be obtained for the occupancy of the land. It follows that in using that amount as the reasonable rental value of the land the trial court erred and that its finding of reasonable rental value has no evidence to support it.

III

In Any Event Appellant Is Not Liable for Occupancy After September 1, 1946

Appellant's occupation of lessees' premises was necessitated by the fact that, in consequence of the dissolution of Defense Plant Corporation,⁸ it had in its charge the properties of Plancor No. 587. However, as of the

⁸ See fn. 6, p. 8, *supra*.

close of business on August 31, 1946, the United States acting by the War Assets Administrator took "custody, protection and maintenance" of those properties⁹ (Ex. 22, R. 208). Thus, by being divested of the properties of the Plancor, appellant's occupation of the premises was terminated. In holding it liable for subsequent occupancy, the trial court has made appellant financially responsible for events over which it exercised no control. Therefore it erred.

If authority to support reason is necessary, it is supplied by this Court's decision in *United States v. Shofner Iron & Steel Works*, 168 F. 2d 286 (1948). There (as here) property built by Defense Plant Corporation and on its dissolution transferred to appellant was by the latter declared surplus and transferred to War Assets Administration. An action brought by the United States to recover possession of the property from the

⁹ The Surplus Property Act of 1944, approved October 3, 1944, 58 Stat. 765, 50 U.S.C. sec. 1611 et seq., created a Surplus Property Board, sec. 5(a), gave it general supervision and direction over the care and disposition of surplus property, sec. 6, and directed it to designate "disposal agencies," sec. 10. Section 11, 50 U.S.C. sec. 1620, provided that owning agencies should report to the appropriate disposal agency all surplus property in their control and that "the disposal agency shall have responsibility and authority for the disposition of such property, and for the care and handling of such property pending its disposition in accordance with regulations prescribed by the Board."

The Act of September 18, 1945, 59 Stat. 533, transferred the Board's functions to Surplus Property Administration, headed by an Administrator. In time the War Assets Corporation became the chief disposal agency (R. 202).

The policy-making and disposal functions were consolidated by Executive Order No. 9689 (Ex. 21, R. 197-201). Thereby, effective February 1, 1946, the functions of the Surplus Property Administrator and his Administration were transferred to the Chairman of the Board of War Assets Corporation and that Corporation. Effective March 25, 1946, the War Assets Administration headed by an Administrator was established and was assigned the functions of War Assets Corporation and its Chairman. Accordingly, the War Assets Administrator had the authority—conferred by section 11 of the Surplus Property Act of 1944—to care for, handle and dispose of surplus property.

former lessee was dismissed on the ground that the United States was not the real party in interest. This Court reversed. It said (168 F. 2d at p. 287):

Having declared the property surplus to its needs and responsibilities, [Reconstruction Finance Corporation] retains no more than the barren legal title for the use of the United States to be transferred wherever the latter may direct. The responsibility and authority for disposing of the property and for its care and handling pending disposal are by the terms of the Surplus Property Act vested in War Assets Administration, an executive arm of the government, and Congress could not but have intended that the Administration take possession of property declared surplus whenever it deemed that course necessary or expedient.

Since the War Assets Administration has—as Congress intended—taken *possession* of the properties of Plancor No. 587 and has left in appellant “no more than the barren legal title for the United States to be transferred wherever the latter may direct,” it is evident that since September 1, 1946, the United States has occupied the premises. If anyone is chargeable for that occupancy it is the United States.

Accordingly, it is submitted that in any event appellant may not be held for occupation of the premises after August 31, 1946.

CONCLUSION

For the foregoing reasons, it is submitted that the provisions of the judgment appealed from which award appellant \$21,166.66 for minimum royalties and \$17,-055.44 for the reasonable rental value of the premises should be reversed.

Respectfully,

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FEBRUARY 1950.

7 F.R. 329

EXECUTIVE ORDER

ESTABLISHING THE WAR PRODUCTION BOARD IN THE
EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING
ITS FUNCTIONS AND DUTIES

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to define further the functions and duties of the Office for Emergency Management with respect to the state of war declared to exist by Joint Resolutions of the Congress, approved December 8, 1941, and December 11, 1941, respectively, and for the purpose of assuring the most effective prosecution of war procurement and production, it is hereby ordered as follows:

1. There is established within the Office for Emergency Management of the Executive Office of the President a War Production Board, hereinafter referred to as the Board. The Board shall consist of a Chairman, to be appointed by the President, the Secretary of War, the Secretary of the Navy, the Federal Loan Administrator, the Director General and the Associate Director General of the Office of Production Management, the Administrator of the Office of Price Administration, the Chairman of the Board of Economic Warfare, and the Special Assistant to the President supervising the defense aid program.

2. The Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

- a. Exercise general direction over the war procurement and production program.

- b. Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and

production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto as he may deem necessary or appropriate.

c. Perform the functions and exercise the powers vested in the Supply Priorities and Allocations Board by Executive Order No. 8875¹ of August 28, 1941.

d. Supervise the Office of Production Management in the performance of its responsibilities and duties, and direct such changes in its organization as he may deem necessary.

e. Report from time to time to the President on the progress of war procurement and production; and perform such other duties as the President may direct.

3. Federal departments, establishments, and agencies shall comply with the policies, plans, methods, and procedures in respect to war procurement and production as determined by the Chairman; and shall furnish to the Chairman such information relating to war procurement and production as he may deem necessary for the performance of his duties.

4. The Army and Navy Munitions Board shall report to the President through the Chairman of the War Production Board.

5. The Chairman may exercise the powers, authority, and discretion conferred upon him by this Order through such officials or agencies and in such manner as he may determine; and his decisions shall be final.

6. The Chairman is further authorized within the limits of such funds as may be allocated or appropriated to the Board to employ necessary personnel and make provision for necessary supplies, facilities, and services.

7. The Supply Priorities and Allocations Board, established by the Executive Order of August 28, 1941, is hereby abolished, and its personnel, records, and

¹ 6 F.R. 4483.

property transferred to the Board. The Executive Orders No. 8629² of January 7, 1941, No. 8875,¹ of August 28, 1941, No. 8891³ of September 4, 1941, No. 8942⁴ of November 19, 1941, No. 9001⁵ of December 27, 1941, and No. 9023⁶ of January 14, 1942, are hereby amended accordingly, and any provisions of these or other pertinent Executive Orders conflicting with this Order are hereby superseded.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
January 16, 1942
[No. 9024]

² 6 F.R. 191.

³ 6 F.R. 4623.

⁴ 6 F.R. 5909.

⁵ 6 F.R. 6787.

⁶ 7 F.R. 302.

In The United States Court of Appeals

For the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellant,

vs.

M. W. MOUAT, as trustee of an express trust, M. W. MOUAT,
and M. W. MOUAT as Administrator of the Estate of May
Paula Mouat, deceased,

Appellees,

and

M. W. MOUAT, as trustee of an express trust, M. W. MOUAT,
and M. W. MOUAT as Administrator of the Estate of May
Paula Mouat, deceased,

Appellants,

vs.

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellee.

Brief of M. W. Mouat, et al., Appellants

APPEARANCES:

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Attorneys for appellant, Mouat.

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In The United States Court of Appeals

For the Ninth Circuit

CAUSE NO. 12,389

MAY PAULA MOUAT and M. W.
MOUAT, wife and husband, and MAY
PAULA MOUAT, as trustee of an ex-
press trust,

Appellants,

vs.

RECONSTRUCTION FINANCE
CORPORATION, a corporation,

Appellee.

JURISDICTION

The jurisdiction of the case was in the District Court, because as alleged in I and I-a of complaint, 2 R., the defendant, Reconstruction Finance Corporation was a United States Corporation, doing business in Montana, the matter in controversy exceeds \$3,000, exclusive of interest and costs; the action arises under Act 47 Stat. 5, U. S. C. A., Title 15, Sec. 601, et seq., as amended 54 Stat. 574 U. S. C. A., Title 15, Sec. 613c, and under Judicial Code Sec. 24 U. S. C. A., Title 28, Sec. 41. Plaintiffs are citizens of Montana, residing at Billings, 4 R.

As to one original defendant, War Assets Administration, the action was dismissed, 45 R., by court order.

For clarity in this brief, we call cross appellants Mouats, and we use the well known initials, RFC.

The jurisdiction of the Mouats' cross appeal (we think the Court of Appeals has no jurisdiction of RFC's appeal, except to dismiss the same) before this Court appears: Title 28, Sec. 1291, U. S. C. A. ,

Judgment was entered June 11, 1949, 391 R. to 397 R., Mouats served and filed on June 18, 1949, motion to make additional findings. 397 R. to 399 R. This motion was not decided by the Court until Nov. 7, 1949, 418 R. The time to appeal was thus extended under Rule 73a and Rule 52b. Notice of appeal was filed Nov. 21, 1949, 419 R. A Surety Company bond was filed with the Notice of Appeal. Omitted from first record, certified copy by Clerk, now filed here. On November 25, 1949, 420 R. to 424 R., Mouats filed Statement of Points to be relied on, in the Cross Appeal. This Statement is adopted for the cross appeal. 429 R.

STATEMENT OF THE CASE

Complaint, 2 R. to 36 R., was filed Sept. 17, 1946. (The date should be remembered for the consideration of certain findings made, and refusal to find, as asked by Mouats.)

The claims alleged in the complaint: (a) May Paula Mouat is the trustee of an express written trust of date December 13, 1941; (b) During all of 1941 Metals Reserve Company was a United States Corporation doing business in Montana; (c) December 20, 1941, Mouats and Metals Reserve Co., for mutual considerations, executed a written lease, attached by copy, "Exhibit A," to complaint; (d) By Act of Congress, June 30, 1945, all assets of Metals Reserve, including Exhibit A, were transferred to RFC, and all liabilities of Metals Reserve placed upon RFC.

"EXHIBIT A," THE LEASE

This was for 10 years, with privilege of extension for 10 years more, on three patented and 23 unpatented mining claims and tunnel sites, locations dated from 1887 to 1941. "The Lessee may at any time after January 1, 1942, on ninety days notice to lessors and by the payment of One Thousand (\$1,000) Dollars, surrender and terminate this lease, provided that, promptly after such termination, lessee shall pay all royalties accrued up to the effective date of such termination, any guaranteed minimum royalty payable to be pro-rated up to the date of such termination and no royalties shall accrue after the date of such termination, said payments to be made to the

Yellowstone Bank, Columbus, Montana, and to be paid by the said Bank to the aforesaid *Trustee*." (Italics ours) 28 R.

"Upon the termination of this lease by either party, lessee shall surrender peaceably the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and the lessors shall have the right to re-enter upon said leased premises owned by them and appurtenances and take full and complete possession of the whole thereof. Upon the expiration of this lease or the termination of this lease for any reason by either party, lessee shall have six (6) months' additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact *all* mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and *wooden buildings* erected upon the demised premises, and ore on dumps upon which royalties have not been paid." (Italics ours) 28 R.

"When this lease, for any cause, shall terminate, the lessee shall deliver to lessors a proper release or certificate of that fact, duly executed and acknowledged, and lessors, upon such termination, and after compliance with all of the terms, covenants and conditions of this lease, shall execute and deliver to lessee a release and discharge from all further liability hereunder." 29 R.

"Time is of the essence of this agreement and all of the grants, terms and covenants, stipulations and conditions expressed herein shall run with the land and in all respects

shall extend to and be binding upon the successors and assigns of the parties hereto." 29 R.

"It is mutually agreed that this lease is a Montana contract and shall be interpreted and construed under and by the laws of the State of Montana." 29 R.

"Lessee agrees with the lessors that unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased upon the termination hereof, for a period of more than *six months* after such termination, shall conclusively be deemed to have been *abandoned* by the lessee in favor of the lessors." 30 R. (Italics ours)

Returning to the allegations of the complaint: It is alleged that on November 15, 1945, RFC gave notice in writing to Mouats that the lease would be terminated February 28, 1946. The notice is set out in the complaint, and recites that the lessee "Does hereby surrender, terminate and cancel that certain lease dated the 20th day of December, 1941, covering certain mining property in Stillwater County, Montana." 6 R.

It is alleged: That the defendant has not delivered any release.

It is further alleged that the lease provided that "upon the termination of this lease by either party, lessee shall surrender peacefully the leased premises and appurtenances in good order, with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and the lessors shall have the right to re-enter upon the said leased premises owned by them, and appurtenances, and take full and complete possession of the whole thereof,"

but at no time since the 28th day of February, 1946, or before such date, have the defendants, or either of them, surrendered peaceably possession of the premises, or any part thereof to the plaintiffs or to either of them; the defendants, acting through servants whose names are unknown to these plaintiffs, have caused the front gate to the said premises to be manned by armed guards day and night; such guards have repeatedly forbidden the plaintiffs to enter the said premises without procuring a written pass, and such guards have ordered plaintiffs not to enter within a fence surrounding a large part of the said premises and surrounding all of the improvements thereon, and when permission has been given to the plaintiff, M. W. Mouat, to enter, he has been followed by guards, and by a sign forbidden to take within his own property described in the lease either a gun or camera. 10 R.

That the plaintiffs have demanded possession of said property on August 28, 1946. 10 R.

That defendants have further broken and failed to keep the terms on them binding of the said "Exhibit A." The defendants agreed to surrender the leased premises and appurtenances in good order upon the termination of Exhibit A. That at the time of the termination of Exhibit A, to-wit: February 28, 1946, there were seventy-nine separate residence buildings and one store building and one company barracks building, all fitted with modern plumbing fixtures and appliances. That the defendants, at exact times unknown to plaintiffs, but between the 28th day of February, 1946, and the date of filing this complaint, have committed waste upon the said premises,

and they have by means of servants and mechanics direct, or by contract with others, dismantled and removed all of the plumbing from the said buildings, though the same was affixed to the real estate and a part of the said buildings. That the defendants have carried away and converted to their own use all of the said plumbing fixtures and materials composing the same. That the said fixtures and plumbing articles taken from each of the said residence buildings was worth the sum of Five Hundred (\$500) Dollars, and the whole thereof was worth the sum of Thirty-nine Thousand, Five Hundred Dollars (\$39,500) taken from the said residence buildings. That the fixtures taken from the said barracks by the defendants were and are reasonably worth the sum of Fifteen Hundred Dollars (\$1,500.00), and by reason of such acts of the defendants in forcibly removing and carrying off and converting to their own use, the said plumbing and fixtures, the defendants have committed damage and detriment to the appurtenances and to the property described in the lease in the sum of Forty-one Thousand Dollars (\$41,000.00), no part of which has ever been paid. (The proof was 103 buildings; in findings of fact, 387 R.)

The plaintiffs pray for judgment for the rents, but as this is a matter of separate appeal, we do not go into that question in this brief.

The plaintiffs pray for \$41,000.00 for waste as to the removal and conversion of the plumbing fixtures.

For the sum of \$600.00 each for the destruction of twenty-two residence buildings.

That the defendants be ejected from the said lands

described in Exhibit A, and that plaintiffs be put in possession of all of the said lands.

The feature of the ejectment is not in either appeal. The trial court issued a Writ of Restitution, which was served shortly after the judgment was entered, and no appeal has been taken from that feature of the judgment.

The plaintiffs pray for such other and further relief as to the Court may seem meet and equitable. 14 R.

The answer of the defendant, RFC, is found 37 R., 44 R. The execution of the lease is admitted. The fact that May Paula Mouat was the trustee of an express trust is admitted to have existed at one time, but the defendant alleges no information or belief as to whether it presently existed. The defendant admits the allegations of the complaint as to the giving of the notice of termination of the lease. 38 R. The defendant admits that it has not executed a release or certificate of termination. 41 R. The defendant admits that on February 28, 1946, certain buildings and structures erected by Defense Plant Corporation were standing on the premises described in the lease.

Defendant admits that certain plumbing equipment was removed from said buildings, but alleges that removal was effected prior to six months from the time the lease was terminated and that removal thereof was authorized by the terms of the lease. 42 R.

Defendant admits that on February 28th and March 1st, 1946, there remained on the premises certain personal property of the type described in the complaint, which personal property was removed prior to August 28, 1946. Defendant denies that any materials so remaining were

removed therefrom subsequent to August 28, 1946. 42 R.

Defendant alleges that plaintiffs at no time had acquired any right, title or possessory interest in that tract of land described in the lease as an unpatented mining claim known as "Lake Placer," with certificate dated July 16, 1940, recorded in Book 23 Misc., page 400, and amended June 16, 1941, 24 Misc. 155. Defendant alleges that as to the area included in said Lake Placer claim, there has been a failure of consideration and that the terms of said lease are not applicable to any of the structures or facilities erected thereon. 43 R.

Defendant alleges that plaintiffs breached said lease by failing and refusing to deliver a quit-claim deed to 200 acres of land, at lessee's written request, for use by the lessee for mill sites, town sites, stockpiling and tailings disposal. 43 R. (We mention this defense, because the Court, in its findings, gives it consideration, and also gives it effect, but there was no evidence introduced at the trial that any request was ever made of the plaintiffs, or either of them, to deliver the quit-claim deed to 200 acres of land described in the lease.)

The Court allowed, over consistent objections, the defendant to introduce parol evidence, to vary the terms, or as was said, to "explain ambiguities" in the terms of the written lease. In the answer there is nothing putting in issue, or tending to put in issue, that the written lease did not mean exactly what it said. But on the contrary, the defendant admits the allegations in paragraph VI. of the complaint. 38 R. And paragraph VI., which is admitted without any qualification, alleges that on the 20th day of December, 1941, Metals Reserve Company, and

plaintiffs, for mutual considerations, entered into the lease, copy of which is marked "Exhibit A," and attached to the complaint.

THE EVIDENCE

We shall attempt to separate for this appeal, the evidence which pertains to it alone, as distinguished from the appeal of the RFC.

Mrs. Mouat had lived close to the land in the lease for thirty years, and was acquainted with it. About a year and a month before the trial, which began November 12, 1947, she wished to visit the upper portion of the land with some friends. The land would be reached from her house up the main road. She was traveling in a car. A chain across the road obstructed her, and the chain was locked. 50 R.-51 R. That was the only way that a vehicle could get to the land. 52 R. There has never been any change in the trust agreement. 52 R.

On August 28, 1946, Mrs. Mouat told the guard: "We are taking possession. Their time was up." 53 R. In the next day or two she saw a notice posted there that referred to Bill Mouat. The notice said they would not let anyone—they said that he could not go through with anything but a pickup and himself, not a man could go through, and the guards followed him when he did go through. 54 R. She identified Bill Mouat as one of the plaintiffs. The chain was a heavy chain that she could not actually get by physically. 57 R.

TESTIMONY OF MALCOLM WILLIAM MOUAT

The difference in elevation between the Mouat house and the camp, a mile up the hill, is 1,900 feet. 62 R. About the first of September, 1946, Mouat sought entrance at the lower gate with Mr. Colton, Mr. Shone and Mr. Maury. 62 R. He could not get his friends through that gate without considerable trouble, an hour. 63 R. Then, when they were allowed through, they were followed by a guard, the guard stopping some distance behind when they stopped. 64 R.

A map was introduced showing the exact number of buildings on the leased premises. 66 R. To the left on the line on the map is the land that was in the lease, and it shows the number of buildings that were placed upon this land, and standing there when the lease was terminated on February 28, 1946.

Nicely for RFC.

The number of these buildings was 103. 238 R. 239 R. The buildings were on cement abutments and the frames were made of wood. The flooring was of wood. The roof was of wood. 69 R. 21 of the buildings were removed in August, 1946, or prior thereto. 233 R. Nicely in charge was working for *RFC from January, 1944 to Sept. 1, 1946*. R. 232. From the remainder "the wall-board has been taken out and some electrical fixtures have been disconnected, and the plumbing has been removed." 233 R.

The value of each of the 22 buildings removed was at least \$400.00, according to Mr. St. John (for RFC). 265 R. 266 R. The total value of the plumbing, etc., after removal from the leased premises was, according to Mr. St. John (for RFC), \$11,795.52. 272 R. The cost

of restoration to the condition of March, 1946, in all of the buildings on the leased land according to Mr. St. John, was \$90,000 to \$95,000. 276 R.

The estimates are higher from Mouats' witnesses. Partly with the purpose of getting a final decision in the Court of Appeals on certain claims, we moved for additional findings. 397 R. These went to the strip of the buildings on the leased premises and conversion of the fixtures; the reasonable cost of replacing same, 398 R., \$90,000; the removal of 22 houses of the value of \$15,300.

The opinion of Judge Pray is found 357 R. to 367 R. Findings of Fact and Conclusions of Law were made in accord with the opinion, June 11, 1949. 378 R. to 391 R. Judgment was entered June 11, 1949, 391 R. to 397 R. This awarded the plaintiffs certain rentals to the date of the trial, also possession of the lands described in the lease. The gravamen of Mouats' appeal is: (because)

"It is adjudged that defendant, Reconstruction Finance Corporation, a corporation, is the owner, and entitled to the possession of all houses, buildings, or structures situated, and being upon the Lake Placer Mining Claims and without requirement of immediate removal." 396 R. Such being the decision as to the buildings, the judgment is silent as to strip of them, or sale of some of them.

It pertains more to RFC's appeal than to Mouats' appeal, but we may mention here that while Mouats' motion of June 18, 1949, for additional findings, was pending, and before notice of appeal was filed by either party, the defendant also moved to re-open final judg-

ment, and further moved that the "findings of fact and conclusions of law be amended to conform with such additional proof, and that judgment be entered accordingly." 399 R.

On August 9, 1949, RFC filed Notice of Appeal. RFC was still pressing its motion to amend the judgment on September 27, 1949. 415 R. Mouats were pressing their motion for additional findings on September 27, 1949. 415 R. Both motions were denied November 7, 1949. 417 R. 418 R.

SCOPE OF MOUATS' APPEAL. 419 R.

This is from parts only of the final judgment:

1.

From:

That portion of said judgment wherein "It is adjudged that defendant, Reconstruction Finance Corporation, is the owner, and entitled to the possession of all houses, buildings, or structures situated, and being upon the Lake Placer Mining Claim and without requirement of immediate removal."

2.

Wherein the said judgment fails to adjudicate that the said plaintiffs were entitled to a judgment for any sum of money at all for waste as to the removal and conversion of the plumbing fixtures of buildings on the Lake Placer, and other strip and waste by destruction of buildings, removal of fixtures, removal of buildings, and all waste committed at the leased premises by defendant.

3.

Wherein the said judgment fails to adjudicate that the plaintiffs were entitled to Six Hundred Dollars each, or any sum, whatever, for the destruction of twenty-two residence buildings on the said Lake Placer.

The Mouats served and filed on November 25, 1949, Statement of Points to be relied on by plaintiffs' cross appeal. 420 R. This is adopted for this appeal in the Court of Appeals. The Specifications of Error are numbered in accordance with the numbering of that statement, and each (except Specifications 6 and 7, which require, under the rules of this Court, a statement as to the evidence introduced and objected to), is almost in the words of the statement.

SPECIFICATION OF ERRORS

1.

The written lease from plaintiffs to Reconstruction Finance Corporation (Metals Reserve Company), provided: (a) "Upon the termination of this lease for any reason by either party, lessee shall have six (6) months additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties, and all excavations, foundations, wooden mine structures, wooden tramway towers, and wooden buildings erected upon the demised premises * * * ." Lessee terminated the lease by written notice February 28, 1946; there were then standing on the leased premises 81 wooden buildings with plumbing and lighting fixtures; before August 28, 1946, lessee extracted

and converted plumbing and fixtures from all these buildings, and converted the same to its own use. (The specification filed has a mistake. There were actually 103 buildings as the Court found. 387 R.)

Cross-appellants assert that the Court erred in finding that these buildings were the property of Reconstruction Finance Company after February 28, 1946.

2.

Cross-appellants assert that Court erred in not giving them judgment for at least the lowest value named in the evidence of 22 of these buildings removed by lessee before suit brought, to-wit: \$400.00 for each, total \$8,800.00.

3.

Cross-appellants assert that Court erred in not giving them judgment for at least the lowest value of the plumbing and other fixtures removed by lessee after February 28, 1946, and before complaint filed, September 17, 1946, i. e., \$11,795.52.

4.

The lease provided that it should be construed by Montana law. The Court erred in not giving the landlords judgment for \$90,000.00, the lowest estimate in the evidence of the necessary cost of replacement of the plumbing and fixtures in the buildings.

5.

This suit was commenced more than six months after lessee terminated the lease; 81 buildings (though fixtures

extracted) were standing on the premises at the trial. The lease provided: "20. Lessee agrees with lessors that unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased, upon the termination thereof, for a period of six months after such termination, shall conclusively be deemed to have been abandoned by the lessee in favor of the lessors."

The Court erred in adjudging that these buildings were not the property of cross appellants.

6.

The Court erred in permitting the lessee to introduce parol evidence to vary or explain the written contract, for that it is plain on its face; for that neither its validity, as written, nor any variance from its plain meaning, was put in issue in the answer.

THE EVIDENCE OBJECTED TO

(Testimony of John Edward Norton.)

"Q. I believe you said that in December, 1941, you proceeded to the area of Billings, Montana, and negotiated for a lease?

A. Yes.

Q. With whom did you conduct those negotiations?

A. Mr. William Mouat, Bill Mouat.

Q. That is the plaintiff in this case?

A. Yes.

Q. Did you have any negotiations with Mrs. Mouat?

A. Yes, Mrs. Mouat took part.

Q. At the time you were negotiating with respect to the lease, was there any discussion of the meaning of the language in paragraph 15, which is as follows,

and I am now reading from the lease which is an exhibit to this case?

“Upon the expiration of this lease or the termination of this lease for any reason by either party, lessee shall have six (6) months additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises, and ore on dumps upon which royalties have not been paid.”

A. Yes, there was a discussion about that.

Q. Was the discussion about what the meaning of wooden buildings would be?

A. Yes, the whole paragraph was carefully discussed. I came out here the first time, the date you said, in June, 1941, for the purpose of getting the lease from Bill Mouat. Of course, at that time we discussed it and Bill agreed to give a lease.

A. Bill agreed to a lease similar to the one that the other chrome property—

A. (Witness): Well, there were no maps of these mining claims available that you could tell just where they were or what they were, and I went over the property with Bill Mouat. I was here for a period I guess all-told of seven or eight days, and there

were no maps to the property that I could definitely say what mining claims we wanted or what, so an abstracter was hired and he went to the courthouse—

- A. (Witness): All right. We discussed this proposition and we did it referring to the proposition of the construction work right at the mine sites, and that there would have to be townsites built, and there were townsites being built at this property, and that is the reason we wanted 200 acres of land deeded to us because the Government wanted title to all of the land on which they put the townsites and millsites.
- Q. (By Mr. McKevitt): Did you have any particular discussion with respect to the meaning of the term wooden buildings, as set out in the lease?
- A. In paragraph 15 we had discussions, quite a few of them, that that paragraph meant structures erected at the mine sites. By mine sites we meant sites where you went in the ore body and opened up to develop the ore body.
- Q. In other words, was there anything in that discussion which would indicate that that term wooden buildings would mean houses to be built at the townsite, at the mine sites, the tram sites or shaft sites, whatever we would need to open up and mine that ore.
- Q. And at the same time this other provision was put in the lease for creating free land for construction of the mill sites and town sites?
- A. Mill sites and townsites there was a paragraph there the Mouat people would deed 200 acres of land.

The objection to this testimony is found 214 R.

“Mr. Maury: We object. It is not material. The lease was finally negotiated and finally admitted to be the genuine lease, and any prior negotiation is not relevant in this case.

A long argument followed and is abbreviated on pages 215 R., 216 R., 217 R., 218 R., 219 R., 220 R.

Mouat's exception is noted 221 R.

The objection was actively and fully pressed. The Court certainly was well advised as to the nature of the objection. He makes a remark during the argument as follows:

“There can be no ambiguity of a wooden building. No man can testify something that is a wooden building is meant not to be a wooden building, any more than a man can say a rocking chair is not a rocking chair.” 215 R.

Another remark of the Court breaks the argument:

THE COURT: “Why didn't they put it in the lease while they were about it?” 218 R.

The only other testimony to vary the terms of the contract is as follows:

ARTHUR S. HUTCHINSON, a witness for RFC on the stand.

Q. “Mr. Hutchinson, do you agree with the testimony—

MR. MAURY: We object as not a proper question—do you agree with the testimony of a certain witness? He can give his own testimony.

Q. Do you agree with the testimony given in this case

yesterday by the witness John Norton, with respect to conversations had with Mr. Mouat at the time the lease involved in this case was being negotiated?

A. I do.

Q. And you are the Mr. Hutchinson who was present the *the* negotiations for the lease involved in this case?

A. Yes.

Q. Mr. Hutchinson, did you have any conversation with Mr. Mouat at the time with respect to including the word 'townsite' in paragraph 22 of that lease?

MR. MAURY: We object as an attempt to vary the contents of a written document that has not been put in issue in this case; it has been agreed to in the answer as being the exact copy. 295 R. 296 R.

THE COURT: Yes, I said I would let them show their theory of it and we will see what they are trying to do; whether they will succeed or not will depend on what the court concludes later on. It will be received subject to objection.

MR. MAURY: All of it along this line.

THE COURT: Yes, all of it.

Q. Mr. Hutchinson, did you have any conversation with Mr. Mouat at the time with respect to including the word 'townsite' in paragraph 22 of that lease?

A. I was present during negotiations.

Q. Would you answer that yes or no?

A. Yes, I was present during the negotiations which were conducted primarily by Mr. Norton with Mr. Mouat.

Q. Would you repeat the substance of that conversation with respect to including the word 'townsite' in the lease, paragraph 22 of the lease?

A. Well, in June of 1941, Mr. Norton was out here and negotiating with Mr. Mouat for a lease. That lease was not acceptable to Reconstruction Finance Corporation, but I used it as a form for preparing the lease in evidence. That lease of '41, among other things, provided—

MR. MAURY: We object to any statement of the contents of that lease unless the lease is here.

THE COURT: Confine your answer to this particular question.

A. Well, Mr. Norton informed Mr. Mouat that more than one townsite, more than one mill site, more than one tailing disposal, and such matters, would undoubtedly be required, and it would be necessary to put all of those terms in the plural in this lease that is in issue.

Q. And how much land did you ultimately decide would be needed for the townsite and mill site purposes?"

The cross-examination, which is very long, shows that a prior proposed lease of six months before the execution of the present lease had substantially the same paragraphs in it that the present lease has. 299 R. 300 R. (But we are drifting into argument.)

7.

The Court erred in permitting the lessee to introduce evidence to impair or dispute the lessors' title to the Lake Placer, one of the 21 mining claims demised.

This was RFC's Exhibit No. 26, a decision of the Acting Land Manager in a contest of the United States against the Mouats. Nothing but the closing paragraph of this seems germane here. This is:

"The preponderance of opinion among the expert mining men and engineers in this case is 'that a prudent man would not be justified in spending time, money and effort in the hope of developing a paying mine, and I so decide'." 327 R.

One objection was that this was not final, that appeal would be taken. (This was taken, the case was remanded for further proceedings by the Secretary of the Interior.) 377 R.

MR. MAURY: We object to the introduction of the exhibit in evidence for the reason that it is not permitted in Montana for a tenant to in anywise impeach the landlord's title after the tenant has once taken possession of the land under the lease. That the action is upon a written lease which has not been put in issue in the pleadings, but which has been admitted. The evidence conclusively shows that the tenant did take possession under it and maintained possession under it, and that the present tenant is under the same liabilities and duties by Act of Congress as the original tenant, the Metals Reserve Company. And, further, that in this very lease there are statements that the lessee would defend and sustain the title to any property that was not held by patent, but that was held by location, and that this property was held, it shows was held by location and—

MR. LAMB: What paragraph is that, Mr. Maury?

MR. MAURY: I will get them for you and I will

show you. 15 is one of the places. "Upon the termination of this Lease by either party, Lessee shall surrender peaceably the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met."

MR. MAURY: That is one of the places that they promised to maintain the possessory claims, but that is not at all necessary. There are two other places. Now in para-12; the Lessee agrees that it will defend the said leased property. In paragraph 13 the Lessee says: "and Lessee shall, nevertheless, make and comply with all obligations and payments for the maintenance of the demised premises and possessory rights, claims and permits up to the said time of re-entry by Lessors." In three places in this lease, but regardless of that, that is not the law.

A special Use Permit of the U. S. Forest Service embracing this land was received in evidence. It was to Defense Plant Corporation. It appears 331 R. to 347 R., paragraph 31 is perhaps germane:

"31. It is expressly understood that when the Metals Reserve Company takes over the interest of the Federal Government in development and/or operation of the chromium mining operations on the so-called Mouat properties in the Stillwater River drainage in Stillwater and Sweetgrass Counties, for which the Defense Plant Corporation is now responsible, the term 'permittee' as used herein, shall be construed to mean Metals Reserve Company instead of Defense Plant Corporation; and the obligations assumed hereunder by the permittee and by

the Forest Service, shall remain the same as if the permit had originally been issued to the Metals Reserve Company. But this construction of the word 'permittee' shall apply only to the Metals Reserve Company; and the transfer of right, title or interest in or to the structures or facilities for which this permit is issued to any other person, organization, or thing shall terminate this permit.

The objection is as follows:

MR. MAURY: We object to the introduction of this instrument as being an attempt by the lessee and its legal successor to impeach the title of the landlord under the lease which has not been put in issue, and also that it is a well-known fact or law rather, that this forest reservation, when erected, reserved to all persons who wanted to enter that reservation for the purpose of mining and milling, and location of mining claims, a right to do so; that that is in all forest reservation enactments, and in the papers erecting the forest reservations in Montana, and that this special use permit is too indefinite to be held to apply to this particular placer location, and that this is one of the things that the lessee promised to sustain."

Exception noted 330 R.

(Specifications 8, 9, 10, 11, 12 following were on the refusal of the Court to grant the Mouats' motion to supplement the findings made after the judgment was entered. One purpose of making this motion was to have the record in such shape that if the Court of Appeals should find that the Mouats were right in their contention about the ownership of the buildings, the Court of Ap-

peals could order final judgment in their favor. We think the Court should have made these findings.)

8.

The Court erred in not finding more fully on the facts as requested in cross-appellants' motion so to do, served and filed within 10 days after entry of judgment, to-wit: June 18, 1949.

9.

The Court erred in not finding specially that the defendant did not leave intact the foundations or wooden buildings upon the demised land, but while wrongfully holding possession from plaintiffs after March 1st, 1946, and previous to September 1, 1946, without plaintiffs' consent, tore out from, and stripped the said buildings of all plumbing in place, some wiring in place, some doors and windows and oil storage tanks in place, and pipes appurtenant, and carried off of the demised land the said plumbing, wiring, oil storage tanks, piping, doors and windows and oil storage tanks in place, and 423 R.

10.

The Court erred in not finding specially that the reasonable and necessary costs of replacing the said plumbing, wiring, doors, windows, oil storage tanks, and pipes appurtenant thereto, was, and is the sum of Ninety Thousand (\$90,000) Dollars. 423 R.

11.

The Court erred in not finding specially that the defendant, without plaintiffs' consent, between March 1st

and September 1st, 1946, removed from the leased premises, and converted to its use, one house of the value of \$600.00. 423 R.

12.

The Court erred in not finding specially that the defendant, without plaintiffs' consent, permitted a third party, after September 1st, 1946, and before the hearing herein, to remove and convert to its own use, and such third party did remove and convert to its own use, and use of said defendant, from said premises, twenty-one houses of the value of Seven Hundred (\$700.00) Dollars each—a total of Fourteen Thousand, Seven Hundred (\$14,700.00) Dollars. 424 R.

CHANGE IN PARTIES

On January 1st, 1950, May Paula Mouat died. Suggestion of her death was made. Exemplified copies of orders of the proper state court appointing M. W. Mouat trustee in her stead, and administrator of her estate have been filed with the Clerk of the Court of Appeals. Order has been duly made that M. W. Mouat, administrator, be substituted for the person May Paula Mouat, and that M. W. Mouat, trustee, be substituted for May Paula Mouat, trustee; cross-appellants, and appellees.

ARGUMENT AND AUTHORITIES

No ambiguity, or variance from clear meaning of the words of the lease was put in issue by the answer. An attempt was made by RFC to prove that the words "wooden buildings," found in a paragraph of the lease, was by agreement made with M. W. Mouat *before execu-*

tion to have a meaning different from "woden buildings." This was, we think, like the impossibility suggested by Mr. Justice Holmes that where parties to a written contract use the words "Old South Church," parol evidence should not be received to the effect that they meant the "Bunker Hill Monument."

But there was no attempt made to explain away another clause; paragraph 20, 30 R. is to the effect that unless there is an understanding to the contrary in writing, anything remaining on the premises for more than six months after termination, "shall conclusively be deemed to have been abandoned by the lessee to the lessors."

When the lease expired there were present on the land 103 wooden buildings. Findings of fact R. 387. (The Court calls them *wooden* buildings.) Time was of the essence. Finding XI. R. 386. Twenty-two were removed before September 1st, 1946, i. e., during the last week of August, 1946. Testimony of Nicely for RFC, 233 R. A map, Exhibit 1 for Mouats, shows 81 of these buildings were standing at the trial. This is not disputed. Suit was begun after the six months expired. We submit that these buildings still standing on the leasehold, are the property of Mouats, and the part of the judgment, 396 R., awarding them to RFC, should be reversed with positive direction to enter judgment that Mouats are the owners of all buildings standing on the property on September 1st, 1946.

THE ATTEMPT TO VARY THE PLAIN MEANING OF THE LEASE BY PAROL EVIDENCE

The provision that buildings erected upon land by a tenant shall, at the termination of the lease, become the property of the landlords, is often inserted in mining leases in the Western States. The Court, in its opinion 365 R., gets aid for its findings that it was not the intention that the wooden buildings became Mouats' in the provisions of the lease that Mouats would, upon written request, by deed quitclaim land not exceeding 200 acres, for townsite and other purposes. But Norton for RFC says: "It was our idea that this 200 acres was deeded, and that that would not be on any land covered by the lease * * *." 230 R.

It would be strange if the 200 acres could be carved out of the leasehold. Were that the true intent, the 200 acres could have been placed over any or all chrome deposits that RFC decided to work, and no royalty above the minimum paid, and then the lease could have been terminated for \$1,000. The RFC would have the mines for the \$1,000 and the minimum royalty for the time required to make the demand and write the quitclaim deed.

The question about the effect of the promise to, *on written request*, quitclaim 200 acres, seems to be a moot one. No request appears in the evidence to have ever been made. Such is also a Court finding. 363 R.

The opinion 365 R. says that it does not seem reasonable to assume, in the absence of clear and unmistakable

language to that effect, that officers and boards of the government would undertake the expenditure of such large sums for homes of their employees with the intention of making a present of such property to lessors upon the termination of the lease, etc.

We think the Courts may only construe the contracts made, not act on what they think the Boards intend to do. Besides, *the Mouats' intentions* are also to be considered. Judge Pray candidly says: "This question is important, and the higher Court may find a different solution." 366 R.

We think Judge Pray's first remark about this line of proof is as refreshing as Judge Holmes' famed analogy. We hope to convince this Court that no witness may say "a rocking chair is not a rocking chair," but we also hope to show the Court that there is not any valid evidence that the parties ever intended that wooden buildings mean something else.

Perhaps no analysis is needed of the evidence of Norton and Hutchinson that during preliminary negotiations, "wooden buildings" meant something else in conversation with Bill Mouat. These took place at Billings. Mrs. Mouat was 90 miles away near the mines. M. W. Mouat's signing the lease at all, may have been of slight importance. A dozen were beneficiaries of the trust to May Paula Mouat. The royalties were all payable to the Columbus Bank, to be paid by the Bank to May Paula Mouat *as trustee*. 22 R.

Norton was asked:

"Now, just what exactly did you tell Mrs. May Paula Mouat?

A. Oh, Mrs. May Paula Mouat, I don't remember that we told her very much." 230 R.

Hutchinson details all the conversation he had with Mrs. May Paula Mouat. It was after the contract was typed, they had driven 90 miles. Not a word pertained to wooden buildings or to the contract's having an occult meaning.

Mrs. Mouat denies that she had any conversation with Hutchinson about any wooden buildings. 348 R.

She said she relied on her attorneys, Judge Goddard (once Chief Justice of the Montana Supreme Court), and Ex-United States Senator Myers. They were both dead. 348 R.

What they would have said if alive, about a different meaning for "all * * * wooden buildings" from the vernacular, having been agreed on, is a mystery. (Or is it? The negotiations had been going on six months; days and nights of work and words preceded its final draft.) It is not credible that Hutchinson, Dwyer, Goddard, Myers, would permit the omission from the contract of a parol agreement, altering a plain meaning of words used, if such agreement was founded on fact. Titles in Montana to valuable property do not exist only in the frail memories of visiting lawyers.

M. W. Mouat denies that there were any conversations with Norton or Hutchinson about buildings that might be placed on the land under the lease before the Court. 351-352 R.

UNDER CONTRACT, THE GOVERNMENT AND PRIVATE CITIZENS ARE ALIKE IN THE COURTS

“When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”

Lynch v. United States, 292 U. S. 571, 78 L. Ed. 1434, at p. 1440 in L. Ed.

In the footnote to the opinion written by Mr. Justice Brandeis, there are cited eleven cases from the Supreme Court itself, and going back to 15 Peters.

“The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State, or a municipality, or a citizen.”

Lynch v. United States, 78 L. Ed. at page 1441 of L. Ed.

“The rule that a contract is to be construed most strongly against the party preparing it, is well settled, and applies to the Government in a case like this, as well as to an individual.”

United States v. Newport News Shipbuilding Co., CCA 4th, 178 Fed. at p. 200.

“The supplementary agreement is signed by General Butler, and not by the plaintiff. Its doubtful expression should, therefore, according to the well-settled rule, be construed against the party who uses the language.”

Garrison v. United States, 7 Wall. 688, 19 L. Ed. 277.

“When the United States Government, or any branch thereof, enters into a contract with an individual, natural or corporate, it does so in its private or business capacity, and not as a sovereign, and submits itself to the same rules of law that govern contracts between individuals.”

Fed. Digest 68, at page 262, key No. 70 (1).

Under this quotation are eight cases cited. As to leases, according to this Digest:

“The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances, will be implied against them. Thus, when they take a lease of real property, they are subject to the same implied obligation not to commit waste as would be raised against an individual tenant.”

United States v. Bostwick, 94 U. S. 53 ; 24 L. Ed. 65.

The form of this lease was in use by the Metals Reserve Co. previously. Hutchinson, “* * * I used it as a form for preparing the lease in evidence.” 296 R.

The record shows that in a lease talked of in June preceding this one of December, there was an identical provision as to leaving intact wooden buildings, and ore on dumps on which royalties have not been paid. In the inchoate lease of June the same provision appears as to “anything remaining on the premises * * * for a period of six months after such termination, shall conclusively be deemed to have been abandoned by the lessee in favor of the lessors.” 299 R. 300 R.

It was evidently used as the structure of the lease from

the owners of the Ben Bow Chrome Mines. Testimony of Norton for RFC, 228 R.

There must be *mutuality* of intent to vary the meaning of a written contract from the plain meaning. Norton and Hutchinson speak only of what *they* intended and what *they* said to Mouat about the meaning of the contract. They are silent about whether Mouat said anything to them about a mysterious meaning being agreed to for "all wooden buildings." Mouat's communications to Norton and Hutchinson seem only that "Bill agreed to a lease similar to the one that the other chrome property" —(interrupted). 222 R.

There is no evidence that by a *custom* or *business usage*, wooden buildings erected in a mine development means only such as house, machinery, etc.

"The natural, obvious meaning of the provisions of a contract should be preferred to any curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind would discover."

Hawkeye Com. Mng. Assn. v. Christy (CCA 8th)
294 Fed. 208.

This contract was agreed to be construed by Montana law.

The parol evidence rule is one of substantive law. A different rule would soon render instruments in writing of no value, and the temptations to commit perjury would be increased. Parol testimony is not excluded because of no probative value, but because it is against the policy of the law that written contracts should be overturned in that manner. Even if the evidence is admitted without

objection, the same rule applies. (Paraphrased from)

Bauer v. Monroe, 117 Mont. 306; 158 Pac. 2nd, 485 (May, 1945).

The Court below attributed some force to the silence of Mouats while the buildings were being placed on this land. The record is silent as to whether or not the Mouats were silent. What right did they have to protest? About the parol evidence rule in an entirely different kind of contract and about silence in a contract, the Montana Court says: "To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question."

Rose v. Emerson-Brantingham Co., 61 Mont. 73; 201 Pac. 316.

The Statute of Montana:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore, there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings.
2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section 93-401-17, or to explain an intrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

93-401-13 RCM, 1947. 10517 RCM, 1935.

The reason for the rule that to dispute the plain meaning of a written contract, the defendant must tender an issue about it, is to permit the plaintiff to meet the contention with evidence. It is a rule of general law as well as by statute in Montana.

Riddell v. Peck-Williamson Co., 27 Mont. 44; 69 Pac. 241.

Courts may not force an ambiguity into a plain contract for the purpose of interpreting it against a party to it.

Southern Surety Company v. McMillan Co. (CCA 10th) 58 Fed. (2nd) 541;

U. S. F. & G. Co. v. Guenther, 281 U. S. 34.

AMBIGUITY

Contemporary construction by acts of the parties must be the acts of both parties.

Kane v. Schuylkill Ins. Co. (Pa.) 48 Atl. 989,
quoted in Sternberg v. Brook (Pa.), 74 Atl.
166, 133 Am. St. Rep. 877.

NOT PERMITTED TO INJECT WORDS INTO A CONTRACT

It never is required, and cannot be permitted, where the injection of additional phraseology narrows the apparent general purpose, and defeats what, except for the addition, would be both a reasonable and a just result.

Ingersoll v. Coram, 127 Fed. 418.

ONE CANNOT PROVE A MERE PRIVATE
UNDERSTANDING

Williston, Vol. 3, p. 1757, p. 611.

NOR CREATE AN AMBIGUITY AND THEN
ADMIT PAROL TO EXPLAIN IT

Williston, P. 610.

Hunt Triplex Safety Glass Co., Fed. (2nd) 92.

"Before a writing may be reformed to express the real agreement of the parties, *the parties must have agreed.*" (Italics ours)

Moffat Tunnel Improv. Dist. v. Denver & S. L. Ry. Co., 48 Fed. (2nd) 715.

"To permit a party to enlarge the obligation of a solemn written contract, deliberately entered into, by the character of parol proof relied upon in this case, would destroy the sanctity of written contracts, and set at naught the very purpose which actuates honest persons when they reduce the terms of their contract to written form."

Southern Surety Co. v. U. S. Cast Iron Pipe & F. Co., (C. C. A. 8th) 13 Fed. 2nd 833, P. 839.

INTEGRATED

10519. "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

10525. "When the terms of an agreement have been intended in a different sense by different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and

when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

Parol evidence that parties did not intend to include buildings described in a bill of sale, is inadmissible.

Hogan v. Kelly, 29 Mont. 485; 75 Pac. 81.

"There is a witness in this case that is not discredited by any fact or circumstance, has an unfailing memory, and has no interest in the outcome of the case, and that is the deed. No suggestion arises from reading it that the parties had any intention other than that which it clearly expresses."

Humble v. St. John, et al., 72 Mont. 519; 234 Pac. 475.

"A 'building' is defined as 'a fabric or edifice, framed or constructed, designed to stand more or less permanently, and covering a space of land for use as a dwelling, storehouse, a factory, shelter, etc.'"

University City, Mo. v. Home Fire & Mar. Ins. Co., 114 Fed. (2nd) 288 (8th CCA.)

"The term is not confined to structures of any particular size or shape." *idem*.

"The general rule is that an insurance contract on a 'building' covers all the inseparable and constituent parts thereof."

BUILDING INCLUDES ALL INTEGRAL PARTS

"The reason for the rule that insurance on a 'building' must be held to cover all the constituent parts thereof, is aptly expressed in Prussian Nat. Ins. Co. v. Terrell, *supra*. (142 Ky. 732, 135 S. W. 419), as follows: 'It must be borne in mind that a

description in a policy of the building insured is never accompanied, or intended to be accompanied, by the particularity of an architect's plans and specifications. The purpose of the description is simply to identify in a general way, the building insured. Because the description fails specifically to include any particular portion of the building is no reason why that portion should be excluded from the operation of the policy. Any other rule would lead to endless confusion and all sorts of frivolous pleas and contentions. The courts would be called upon to say whether or not a bay window, a back porch, or a bathroom was included in the policy which simply described in a general way the building of which they were a part at the time the insurance was obtained. The result would be that, unless a man took the care to describe with particularity each and every portion of the building insured, he would never know what his rights were under his policy; while an insurance company would always have some plausible pretext upon which to resist payment of the policy."

SPECIFICATION 7

DISPUTING LESSOR'S TITLE

After this suit was started, the defendant attempted to get part of the case decided by the Bureau of Land Management, and to thus withdraw jurisdiction as to part of it from the Court. The buildings are on the Lake Placer, which is a mining location not yet patented. The defendant had agreed in the lease that it would defend and sustain the title to any property that was not held by patent, but that was held by location, and that at the termination of the lease, it would surrender peaceably the leased premises and appurtenances in good order, with all payments and obligations for maintenance thereof, and

for the maintenance of possessory claims and rights and permits fully met.

The defendant offered in evidence a decision of the acting Land Manager in a contest of the United States vs. the Mouats, involving the Lake Placer location. The plaintiff objected that this was an attempt to impair or dispute the landlord's title, which could not be done after the defendant had gone into possession and enjoyed peaceable possession until the lease expired. The plaintiffs also objected that this decision was not final; that appeal would be taken; that the time to appeal had not expired. This appeal was taken to the Secretary of the Interior, and the case was remanded for further hearing. A certified copy of the decision of the Secretary of the Interior was presented to the Court before decision and ordered filed, 368, 369 R., so that on the present record the question may be moot. No further decision of the acting Land Manager appears since the order remanding the case; however, we think the question should be set at rest and answered by this Court for its effect on any future proceedings, that may result if the Mouats' contentions as to the buildings are found by this Court to be correct. These Government agencies stand no higher before the law than the United States. This agency agreed that it would be bound in the construction of this contract by Montana law. When the United States enters into a lease, then they are subject to the same implied obligations not to commit waste as would be raised against an individual tenant.

U. S. v. Bostwick, 94 U. S. 53, reversing Lovett v. U. S., 9 Ct. Cl. 479.

Estoppels similar to that against the tenant to deny the title of the landlord are enforced in contracts for personality, as well as in leases of real estate, and these are enforced against the United States. The United States is not allowed to sink in its business dealings below the standards of business honesty.

“The other objection relied on by the government in this case is, that the claimant had no valid title to the steamer as against the United States, having obtained her from the Confederate Government in 1863, in payment for supplies furnished to the Quartermaster's Department of that government. This objection cannot be sustained. When the contract was made with the claimant, the vessel was in Mexican waters, and not subject to the jurisdiction of the United States. The claimant was applied to for its use. It was agreed that he should be compensated. No question was made about his title, and it is not suggested that he was guilty of any concealment or suppression of the truth in regard to it. Under these circumstances, it would be bad faith on the part of the government, after getting possession of the steamer and getting it within its jurisdiction, under pretense of hiring it of the claimant, to set up that he had no title to it.”

Clark v. United States, 95 U. S., 539.

The RFC desired to have a decision in this case follow a final determination by the Interior Department. If the case is reversed, it may renew such desire. Such wishes should not prevail. To thwart such wishes is one purpose of the rule.

“We think the principle, that the lessee cannot dispute the title of his lessor, also applies. We see nothing to take the case out of this long settled and

salutary rule * * *. The rule applies with peculiar force where the lessor was in possession, and transferred that possession upon his faith in the validity of the lease to the lessee * * *."

"According to the views upon which the judgment below was given, the lessee could not only refuse performance of all his covenants, but, at the end of the term, he could have held possession in defiance of his lessors, and he could have continued to hold possession until they showed a valid title in a suit brought to enforce it, or until such a title in such a suit was shown by some other party. This, we think, would be contrary alike to reason, justice, and the law."

Scott, et al., v. Rutherford, 92 U. S. 107;

Parrott v. Hungelberger, 9 Mont. 526; 24 Pac. 14;

Fiers v. Jacobson, Mont. Sup. Ct., Nov. 8, 1949;
211 Pac. 2nd 269.

The evidence shows that the taking of the plumbing, etc., from the buildings took place before August 28, 1946, and after February 28, 1946. Testimony of Nicely for RFC, 254 R. and Answer of RFC, 42 R.

"Defendant alleges that in April, 1945, all Defense Plant Corporation (Plancor) structures, equipment and facilities on the leased property (but not the Metals Reserve Company lease itself) were released by War Production Board, etc."

Answer RFC 41 R.

Nicely was working for RFC until September 1, 1946. 244 R.

All the acts of dismantling were admittedly done by some agency of the United States. The United States could have maintained a suit without joining as plaintiff

Metals Reserve Co., or RFC, against Mouats for any breach of the lease.

United States v. Shafner Iron & Steel Works (CCA 9th) 168 Fed. (2nd) 286. It would seem that the rule would work both ways, even if the evidence was not affirmative and uncontradicted that the acts complained of were done by RFC, and that by its answer it remained tenant in possession. At the close of the trial, Mouats moved for a Writ of Restitution. RFC opposed it. 256 R.

REPLACEMENT COST AS MEASURE OF • DAMAGE

The following cases support Mouats' claim that the measure of damages for the strip and waste committed by RFC is in Montana the replacement cost.

McIntosh v. Hartford Fire Ins. Co., 106 Mont. 443; 78 Pac. (2nd) 82;

Evankovich v. Howard Pierce, Inc., 91 Mont. 344; 8 Pac. (2nd) 653;

Givens v. Markall, Cal. App.; 124 Pac. (2nd) 839.

Partly in order to persuade the Court below to set at rest the question of value of replacement so that if Mouats' contention as to ownership is correct, the Court of Appeals could finally adjudicate, we moved the Court that a finding be made that the cost of replacement was \$90,000, according to the testimony of Mr. St. John, a witness for RFC. The testimony of the Mouats on replacement was that it would cost above \$160,000. If that was a waiver of any excess, and it was meant to have such effect, in order to get a final determination, it may

be considered such for the purpose of this appeal. Mr. St. John's evidence appears 261 R. The evidence of architects for the plaintiffs appears at 69 R. to 82 R.

LIABILITY OF PRESENT TENANT

T. A. D. Jones Co. v. Winchester Repeating Arms Co., 55 Fed. (2nd) 944.

This is to the effect the original lessee becomes a surety for the performance by its assignee of the obligation of its covenants. In Montana, a surety's liability is identical with that of the principal obligor.

CERTAIN STATUTES OF MONTANA

The attornment of a tenant to a stranger is void unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction. 7748 RCM, 1935.

"When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy, or, where there has been no written lease, until the expiration of ten years from the time of the last payment of rent, notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods prescribed in this section."

9023 RCM, 1935.

RFC has no immunity as of sovereignty.

RFC v. J. G. Menihan Corp., 312 U. S. 81.

Governmental functions exercised by RFC do not exceed those exercised by national banks.

State Tax Commissioner of Maryland v. Baltimore Bank, 169 Md. 65-180 A. 260, and appeal dismissed 296 U. S. 538.

SPECIFICATIONS 8, 9, 10, 11, 12

When Judge Pray announced in his opinion, that the upper Court might take a different view of the contract as to the ownership of the buildings, he himself frankly stated a condition of the record which made it quite desirable that he make findings of fact sufficient to enable the Court of Appeals to decide all questions pertaining to the proof of the fact by the findings without an examination of the record. Thus, if such finding had been made, the Court of Appeals would be in position to order the entry of final judgment if it sustained the plaintiffs' contention as to the law and the interpretation of the contract. We think that is the reason for Rule 52a that "The Court shall find facts specially."

However, the facts which Mouats requested to be specially found are undisputed, and are sustained as well by the testimony of RFC as by the testimony of the Mouats. If the law as to the ownership of the buildings as of date March 1st, 1946, is found by the Honorable, the Court of Appeals, to be as believed by the Mouats and their counsel, then we think the record is so plain as to the fact which the Mouats asked to be found that the Court of Appeals can and should order a judgment in favor of the Mouats in accord with the facts. We point out the testimony sustaining each of such facts.

Specification 9 is conclusively supported by the testimony of Nicely, 254 R.

Q. How much of the plumbing, wiring and other fixtures were removed from the leased property before the 1st of September, 1946, and after the 28th of February, 1946, I mean in that six months?

A. Well, you have it all there in a document you submitted as evidence, the number of lavatories, toilets, bath tubs, and so forth.

Q. What I wish to know is was it all of the plumbing, all of the wiring and all of the fixtures insofar as they have been removed, were they removed previous to August 28th, 1946?

A. That is right. 254 R.

Specification 10 is conclusively sustained by the evidence of Mr. St. John, a witness for RFC.

Q. Now, Mr. St. John, we will get to that restoration. What would it cost to restore that plumbing to those buildings and put it in the position wherein it was in March in 1946?

A. You mean the 22 houses?

Q. I mean all of them that are on the leased ground?

A. I would say roughly speaking, in the neighborhood of ninety or ninety-five thousand dollars. That is just roughly speaking. 275 R., 276 R.

Specification 11 is conclusively sustained:

Q. How many had they taken off prior to August 1st, 1946?

A. One. (Testimony of Nicely, 233 R.)

Q. And the balance of the 21 were removed after that date, I presume?

A. That is right. (233 R.)

However, the specification claims that the value of the buildings was \$600.00. Mr. St. John for the RFC set it as of a value of \$400.00.

In order to end the litigation, we hereby agree to the value asserted by Mr. St. John. His testimony is at 266 R.

Specification 12, as to the number of buildings removed, 21 houses, is conclusively sustained by the words of Nicely for RFC:

A. Yes, 22 removed. (252 R.)

The value in specification 12 is set at \$700.00 each. For the purpose of a final determination of the litigation, we waive a valuation of \$700.00 and agree to the Court of Appeals adopting the valuation of St. John, \$400.00 each.

We respectfully submit that as to the parts of the judgment appealed from, judgment should be reversed, and the Court of Appeals should order judgment entered:

1. That the Mouats are the owners of all wooden buildings standing on the leased premises.

2. That they were the owners of all wooden buildings standing on the leased premises on March 1, 1946.

3. That they have judgment for the necessary costs of replacing the plumbing, wiring, doors, windows, oil storage tanks, and pipes appurtenant thereto, fixed by Mr. St. John at \$90,000.00.

4. That they have judgment for the value of one house removed by defendant before September 1, 1946, \$400.00.

5. That they have judgment for the value of twenty-one houses removed from the premises before suit was commenced, and after September 1st, 1946, at \$400.00 each, \$8,400.00.

Respectfully submitted,

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In The United States Court of Appeals

For the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellant,

vs.

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and M. W. MOUAT as Administrator of the Estate of May
Paula Mouat, deceased,

Appellees,

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FINANCE CORPORATION AND POINTS AND
AUTHORITIES IN SUPPORT THEREOF

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In The United States
Court of Appeals
For the Ninth Circuit

No. 12,389

RECONSTRUCTION F I N A N C E
CORPORATION, a corporation,
Appellant,
vs.

M. W. MOUAT, as Trustee of an express
trust, M. W. MOUAT, and M. W.
MOUAT, as Administrator of the Estate
of May Paula Mouat, deceased,

Appellees.

MOTION TO DISMISS THE APPEAL OF
APPELLANT RECONSTRUCTION FINANCE
CORPORATION, A CORPORATION

Comes now M. W. Mouat, M. W. Mouat as Trustee,
substituted for May Paula Mouat, as Trustee of an ex-
press trust, and M. W. Mouat, as Administrator of the
Estate of May Paula Mouat, deceased, and moves this
Honorable Court to dismiss the appeal of appellant, Re-
construction Finance Corporation, a corporation, filed on
August 9th, 1949, 403 R., on the ground, and for the

reason that this Court lacks jurisdiction of said appeal, in that said appeal is premature, as the judgment appealed from was not a final judgment when said appeal was taken, in that:

(a) Judgment was entered June 11, 1949, 391 R.-397 R.

(b) Appellees, Mouats, moved to make additional Findings of Fact, which Motion was filed June 18, 1949, 397 R.-399 R.

(c) Appellant, Reconstruction Finance Corporation, moved to re-open final judgment, and to take additional testimony, which motion was filed July 20, 1949. 399 R.-402 R.

(d) Minute Entry of hearing appellees Mouats' Motion to make additional Findings of Fact, and of hearing appellant, Reconstruction Finance Corporation's Motion to Re-open Final Judgment, and to take additional testimony. 415 R.-416 R.

(e) Order denying appellees Mouats' Motion to make additional Findings of Fact entered November 7, 1949. 418 R.

(f) Order denying appellant Reconstruction Finance Corporation's Motion to re-open final judgment, and to take additional testimony, entered November 7, 1949. 417 R.

Therefore, when Reconstruction Finance Corporation, appellant, filed its Notice of Appeal on August 9th, 1949, there was then pending before the District Court, appellees Mouats' timely Motion to make additional Findings of Fact, which under Rule 73 (a) of the Federal Rules of

Civil Procedure, terminated the running of the time for appeal, regardless of whether or not an alteration of the judgment would be required if the motion was granted.

This motion is made and based on the transcript of the record on file herein.

THOMAS C. COLTON,

H. L. MAURY,

A. G. SHONE,

Attorneys for appellees,
Mouats.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS THE
APPEAL OF RECONSTRUCTION FINANCE
CORPORATION, A CORPORATION

STATEMENT OF FACTS

Judgment was entered herein on June 11, 1949, 391 R.-397 R., and within ten days thereafter, June 18, 1949, as provided by Rule 52 (b) of the Federal Rules of Civil Procedure, appellees, Mouats, served and filed their Motion requesting the Court to make additional Findings of Fact, 397 R.-399 R. This motion was denied on November 7, 1949. 418 R.

Appellant, Reconstruction Finance Corporation, on July 20, 1949, served and filed its motion to re-open the final judgment and to take additional testimony. 399 R.-402 R.

Both motions were argued, in open court, by counsel for the respective parties on September 27, 1949, and each of the parties were granted time within which to file briefs in support of their motions, and upon the filing of briefs, the motions were to be considered as submitted. 415 R.-416 R. Appellant, Reconstruction Finance Corporation's motion was denied on November 7, 1949. 417 R. During the pendency of both motions, and on August 19, 1949, appellant, Reconstruction Finance Corporation, filed its Notice of Appeal to this Court. 403 R.

ARGUMENT

The effect of the Motion, under Rule 52 (b) of the Federal Rules of Civil Procedure, to amend or supplement the Findings of Fact is to toll the period during which an appeal may be taken from a final judgment. *Fiske v. Wallace*, (8th Cir.) 115 Fed. (2nd) 1003; *Zimmerman v. United States*, 298 U. S., 167, 80 L. Ed. 1118, 56 S. Ct. 706, and, whether so stated to be, is actually a motion to amend the judgment if such course should pursue the amended Findings of Fact.

Appellees Mouats having exercised their right to move for additional Findings of Fact, within time, and before the appeal was taken by Reconstruction Finance Corporation, preserved jurisdiction in the District Court, and the time for taking the appeal was extended until the Court decided the motion. *Fiske v. Wallace* (8th Cir.), 115 Fed. (2nd), 1003, 1004. This reasoning is undoubtedly based on the theory that the judgment was not final while a motion, in time and before appeal, was pending. *Kingman v. Western Mfg. Co.*, 170 U. S. 675, 42 L. Ed. 1192, 18 S. Ct. 786. The rule requires that the judgment, to be appealable, should be final, not only as to all of the parties, but as to the whole subject matter, and as to all of the causes of action involved. *Collins v. Miller*, 252 U. S. 364; 64 L. Ed. 616, 619; *Louisiana Nav. Co. v. Oyster Comm.*, 226 U. S. 99, 101; 57 L. Ed. 138-140; 33 Sup. Ct. 78; *Sheppy v. Stevens*, 200 Fed. 946.

Appellees, Mouats', motion to make additional Findings of Fact, was timely. It was filed within ten days as provided by Rule 52 (b) FRCP.

Rule 73 (a) FRCP provides * * * "The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run, and is to be computed, from the entry of any of the following orders made upon a timely motion under such rules * * * or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted * * *."

Subdivision (a) of Rule 73, FRCP was amended in 1946, and among other amendments, there were inserted in said rule the words: "Whether or not an alteration of the judgment would be required if the motion is granted."

The notes of the Advisory Committee on the Amendments to the Rules contains the following:

"Now suppose a timely motion to amend the findings under Rule 52 (b) is made, but the desired amendment deals only with purely formal or mechanical matters upon which findings have been made and the motion, if granted, would not require an alteration of the judgment. In *Leishman vs. Associated Wholesale Electric Co.* (1943), 318 U. S. 203, 63 S. Ct. 543, 87 L. Ed. 714, the Supreme Court stated that a motion to amend and supplement the 'findings of fact in more than purely formal or mechanical aspects tolls the appeal statute, and * * * the time for taking an appeal runs from the date of the order disposing of the motion.' Hence, an appeal taken before disposition of such a motion, is premature. *United States v. Crescent Amusement Co.*, (1944) 323 U. S. 173, 65 S. Ct. 254, 89 L. Ed. 160. Since the motion in the *Leishman* case involved matters that were more than purely formal or mechanical, the Court did not have to deal with the effect of a

motion involving only such matters. But due to difficulty in distinguishing between what is substantial and what is purely formal or mechanical, and because the motion under Rule 52(b) must be made not later than 10 days after the entry of the judgment, Rule 73(a) states specifically that the full time for appeal to a court of appeals runs from entry of the order granting or denying a timely motion under Rule 52(b) to amend or make additional findings of fact, 'Whether or not an alteration of the judgment would be required if the motion is granted.' While it cannot be said with certainty that this principle, which may be said to involve an extension of the Leishman doctrine, would be applicable to extend the time for a direct appeal, it is believed that the principle should be applicable to a direct appeal in the interest of uniformity and for the reasons that prompted the Committee to recommend and the Court to promulgate the provision in Rule 73(a)."

Moore's Federal Rules as amended, 1939, 1946, 1948, with comments on the amendments, page 1201.

"If the motion is *timely* made the full time for appeal commences to run anew and is to be computed from the entry or an order granting or denying a motion under Rule 50(b), 52(b), and 59(e); and from an order denying a motion for a new trial under Rule 59(b). If the court grants a motion for a new trial made by a party under Rule 59(b), or grants a new trial on its own initiative under Rule 59(d) then there is, of course, no judgment to appeal from, and the time for appeal does not commence to run until the entry of a new judgment following the new trial.

"As pointed out in the Comment to Rule 72, *supra*, the Leishman case recognized that a motion to amend or make additional findings of fact in more than purely formal or mechanical aspects tolls the running of the time for appeal. Since it is difficult to distinguish between a motion raising only formal or

mechanical matters and one going to substance, and since the motion under Rule 52(b) to be timely must be made within the ten day period, Rule 73(a) in the interest of certainty provides that the motion under Rule 52(b) tolls the running of the appeal time 'whether or not an alteration of the judgment would be required if the motion is granted'. This provision then goes beyond and settles a matter not expressly decided in the Leishman case."

Moore's Federal Rules as amended, 1939, 1946, 1948, with comments on amendments, page 1201.

The 1946 amendments do three things:

(1) Prescribe the time within which an appeal to a Court of Appeals may be taken that, in general, is shorter than formerly prevailed;

(2) Prescribe the effect upon the appeal time of the making of certain motions that affect the finality of a judgment; and,

(3) Allow the dismissal of an appeal by the District Court under certain circumstances, where the appeal has not yet been docketed with the Court of Appeals.

These three matters are discussed in detail in the notes of the Advisory Committee on Amendments, and will be found in Moore's Federal Rules, as amended, 1939, 1946, 1948, with comments on the amendments at page 1206-1214.

Leishman vs. Associated Wholesale Electric Co., 318 U. S. 203, 87 L. Ed. 714, 63 Sup. Ct. 543, was decided February 15, 1943, and United States vs. Crescent Amusement Co., 323 U. S. 173, 89 L. Ed. 160, 65 Sup. Ct. 254, was decided December 11, 1944, so that we believe the

amendment to Rule 73(a) "Whether or not an alteration of the judgment would be required if the motion is granted," goes beyond and settles a matter not expressly decided in either the Leishman case, *supra*, or the Crescent Amusement Company case, *supra*, because the 1946 amendment was made after both of these cases were decided. The rule is now so broadened that finality cannot be given to the judgment until the motions designated in Rule 73(a) are disposed of.

Unquestionably the general rule is that the time for taking an appeal is suspended by a seasonably filed motion under Rule 50(b), 52(b) or Rule 59 as provided in Rule 73(a) F. R. C. P.

Morse vs. United States, 270 U. S. 151, 154, 46 S. Ct. 241, 242, 70 L. Ed. 518; *Safeway Stores vs. Coe* (D. C.) 136 Fed. (2nd) 771, 774.

"Rules of practice and procedure are devised to promote the ends of justice and should be liberally construed, but the courts have repeatedly held that an appeal is granted to the losing party on condition that he complies with the statute permitting an appeal; that an appellant must be held to have known of the existence of the statute; and that the requirements of the statute are jurisdictional and cannot be avoided." *Ray, et al., v. Morris, et al.*, (7th Cir.) 170 Fed. (2nd) 498, 499; citing *Mosier vs. Federal Reserve Bank of New York* (2nd Cir.) 132 Fed. (2nd) 710. Since the question is one of jurisdiction, this Court must proceed to consider it, even though there be no moving party.

Continental Casualty Co. vs. United States (9th Cir.) 167 Fed. (2nd) 107, 108.

We pass the question of the right of appellant, Reconstruction Finance Corporation, to file its Motion under Rule 60(b) FRCP "to re-open the judgment and to take additional testimony," for the reason that the judgment was not a final judgment, as required by the rule, while appellees, Mouats', Motion "to make additional Findings of Fact," filed within time, was pending and undisposed of.

We respectfully submit that appellees, Mouats', Motion to make additional Findings of Fact was filed within time, and terminated the running of the time for appeal until the Motion was disposed of, and that any appeal taken, by either party, during the pendency of appellees, Mouats', Motion was premature, as the judgment was not a final judgment until the appellees, Mouats', Motion was decided.

We submit that this Court lacks jurisdiction of the appeal herein by appellant, Reconstruction Finance Corporation, and, therefore, this Motion should be granted, and appellant, Reconstruction Finance Corporation's appeal to this Court should be dismissed.

Respectfully submitted,

THOMAS C. COLTON,
H. L. MAURY,
A. G. SHONE,
Attorneys for Mouats.

APPENDIX

RULE 52

FINDINGS BY THE COURT

b. AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings or make additional findings, and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULE 73

APPEAL TO A COURT OF APPEALS

a. WHEN AND HOW TAKEN. When an appeal is permitted by law from a District Court to a Court of Appeals, the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party, the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment, the District Court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original

time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules; granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59 * * *."

Service of the above and foregoing Motion to Dismiss and Points and Authorities in support thereof, are hereby acknowledged, and copy thereof received this..... day of February, 1950.

RECONSTRUCTION FINANCE
CORPORATION, a corporation,
Appellant,

By:.....

.....

.....

.....

Attorneys for appellant.

In The United States
Court of Appeals
For the Ninth Circuit

RECONSTRUCTION FINANCE COR-
PORATION, a corporation,

Appellant,

vs.

M. W. MOUAT, M. W. MOUAT, as
trustee of an express trust, M. W. MOUAT,
Administrator of the Estate of May Paula
Mouat, deceased,

Appellees,

and

M. W. MOUAT, M. W. MOUAT, as
trustee of an express trust, M. W. MOUAT,
Administrator of the Estate of May Paula
Mouat, deceased,

Appellants,

vs.

RECONSTRUCTION FINANCE COR-
PORATION, a corporation,

Appellee.

Brief of the Mouats as Appellees

THOMAS C. COLTON,
Billings, Montana;

JOHN B. TANSIL,

H. L. MAURY,
Butte, Montana;

A. DEVITT VANECH,

A. G. SHONE,
Butte, Montana,

JOHN F. COTTER,

Attorneys for Mouats,
Appellees.

Attorneys for RFC.

FILED

MAR 1 - 1930

PAUL D. CARRION

In The United States Court of Appeals

For the Ninth Circuit

RECONSTRUCTION FINANCE COR-
PORATION, a corporation,

Appellant,

vs.

M. W. MOUAT, M. W. MOUAT, as
trustee of an express trust, M. W. MOUAT,
Administrator of the Estate of May Paula
Mouat, deceased,

Appellees,

and

M. W. MOUAT, M. W. MOUAT, as
trustee of an express trust, M. W. MOUAT,
Administrator of the Estate of May Paula
Mouat, deceased,

Appellants,

vs.

RECONSTRUCTION FINANCE COR-
PORATION, a corporation,

Appellee.

Brief of the Mouats as Appellees

THOMAS C. COLTON,
Billings, Montana;

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H. L. MAURY,
Butte, Montana;

A. DEVITT VANECH,

A. G. SHONE,
Butte, Montana,

JOHN F. COTTER,

Attorneys for Mouats,
Appellees.

Attorneys for RFC.

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In The United States
Court of Appeals
For the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

M. W. MOUAT, as Trustee of an express trust, M. W. MOUAT, and M. W. MOUAT, Administrator of the Estate of May Paula Mouat, deceased,

Appellees.

We do not waive appellee's Motion that this appeal be dismissed.

REMOVING THE CORPORATE VEIL.

When the lease was executed, Metals Reserve Company was just the United States, Pro hac vice, the United States was Metals Reserve Company. Thereafter, RFC substituted by law was only the United States. Pro hac vice, the United States was RFC. War Assets Administration was the United States. The United States was War Assets Administration. The Forestry Department is the United States. The Department of the Interior (Bureau of Land Management) is the United States. The Federal Courts are the United States. Their power springs solely from the United States, but not to be interfered with by

any other branch of the Government. Some agencies through which the United States acts, and in which its sovereignty appears, are not subject to private suit in the courts. Until the Torts Claims Act, few United States agencies were subject to suit at all. But the Congress early became aware that injustice was sometimes done by these agencies to citizens. For redress of this, the Court of Claims was established.

The burden of litigation in that Court, due to the entry of the United States into many forms of work widely distributed, the burden and expense to citizens deeming themselves aggrieved, of presenting their evidence of their claims in the Court of Claims at the Capitol, impelled the Congress to partly surrender the immunity from suit of the United States when it chartered banks during the Civil War,—and later when itself entered the banking field, and other activities by chartering the Reconstruction Finance Corporation.

Those statements are axiomatic. They would compel and give firm support to the decision of this Court in *United States vs. Shofner Iron and Steel Works*, 168 Fed. 2nd, 286. Except that Metals Reserve Company, lessee, and RFC, substituted by law for it, were not immune from suit in the local United States District Court, the lease would be exactly the same if the lessee had been by name "The United States of America."

The case we think may be stripped of fine-spun logic, hard to follow, if we "pierce the corporate veil" where there is a single stockholder as is done in Montana. This contract was agreed to be construed by Montana law. We put the *entire* paragraph 24 before the Court with the substitution. It then would read:

"24. Anything in this Lease contained to the contrary notwithstanding, any strike, lockout, difference with workmen, accident, fire, explosion, flood, earthquake, embargo, mobilization, war, foreign war, hostility, riot, requirement, regulation, restriction or other act of any government or governments, whether legal or otherwise, acts of public enemies, the elements, force majeure, inability to secure or delay in securing cars, labor, raw materials, fuel, or other supplies or material or electric power necessary for the operation of the leased premises or the operation of the *United States'* facilities, failure of the ore supply or loss of the ore body in the said leased premises or inability to secure sufficient ore of the grade required for concentrating from the said leased premises, unforeseen metallurgical or milling delays, delays or interruptions in transportation by rail, water or otherwise, damage to or destruction of such mines or plants or other operating facilities and any other contingency, whether or not the nature or character hereinbefore specifically enumerated, *which is beyond the control of the United States, or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist.*" (Italics ours.)

Then if the absolution from payment of minimum royalty claimed here can be sustained on this evidence, it must be based on an interpretation of the contract that the payment may be forgiven by an order of the lessee given to itself, i. e., by the mere will of the lessee, an event not "*beyond its control*," as stated in the writing, but always in its control and power.

Thus the plaintiffs' property could be held under the lease without payment of rental, not for only 10 years, as mentioned in the appellant's brief, but for an additional

period of 10 years according to the renewal clause, par. 28 R. 32.

Of course, Mrs. Mouat's counsel must have examined the lease before it was executed, but it was prepared by counsel for the lessee, who says "That lease was not acceptable to Reconstruction Finance Corporation, but I used it as a form for preparing the lease in evidence." 296 R.

Even if there were evidence of an affirmative order—(there is none) it would be hard to believe that it was the intention of the Government that there be set in the contract a snare for a 19-year lease without payment of any royalty. The act of the defendant in paying the first royalty of \$10,000 before production commenced, would rebut such an intent of the parties. It might be easy to find a suggestion in some file postponing production until a tunnel encountered the vein.

The \$10,000 annual minimum royalty clause was inserted, as we submit, to provide a consideration for holding the mines non-productive, unless the lessee were prevented from working them by a divinely caused Act of God, not by a manufactured "Deus ex machina" Act of God,—with the lessee as Deus in the machine.

As mentioned in the opinion of Judge Pray, "Lessee agrees to carry on its operations hereunder diligently." R 25.

Even if paragraph 24 stood alone for interpretation without reference to other parts of the contract, it would not be possible to construe it as appellant contends, because it would lead to such unreasonable result as to prevent any enforcement of this contract by the courts.

But the interpretation claimed for it has also to face a sentence isolated by a period.

“7. Beginning January 1, 1943, *and thereafter during the term of this lease*, Lessee agrees to pay to, and deposit with the Yellowstone Bank at Columbus, Montana, to be paid by said Bank to May Paula Mouat, as Trustee, a minimum royalty of Ten Thousand Dollars (\$10,000) per year, payable quarterly on or before thirty days after the end of each calendar quarter.” (Italics ours.) R 23.

THE ALLEGED NECESSITY

The order which the appellant now claims was *compulsory* and prevented any further operation is of date September 13, 1943, signed by Mr. Batcheller. The objection to the introduction of Exhibit 7, R 156, should have been sustained.

The record seems silent as to whether or not the letter was ever delivered to the addressee. No postmark accompanied it. The Honorable Jesse Jones does not appear to have answered it. Its date was September 13, 1943. R 160. (The letter did reach Metals Reserve Company according to a letter to the Mouats of December 11, 1943, signed by Mr. G. Temple Bridgeman.) It was not regarded by Metals Reserve as an order, but only advice. Nine days after its date, G. Temple Bridgeman, Executive Vice President of the Metals Reserve Company, writes its operating company, Anaconda, about the letter now claimed to be an order. It is there called a “request.” R 190. It was indeed, only a suggestion. Its closing paragraph is:

“The question arises at this time as to whether it will be advisable to carry through from level to

level a stope or two in both the "G" and "H" veins, as suggested by Mr. Browning. We should like to see this done if it can be conveniently fitted in with the general shut-down program. We shall appreciate your views in this regard." R 192.

Enough supplies were to be kept for an output of 2,000 tons per day. R 192.

A stope is an excavation for extracting ore as distinguished from a shaft, drift, airway. Webster's New International Dictionary.

"Stope. The working above or below a level where the mass of the ore body is broken."

Morrison Mining Rights, 16th Ed. 783.

That the shut-down was only of volition, not of compulsion, appears also from a telegram from Mr. Bridgeman to Anaconda, September 16, 1943, saying (among else):

"Maintain sufficient men to keep entire plant in operating condition, and under ground workings in good repair. All arrangements of shut-down should be such that production can be resumed with reasonable promptness upon notice from us to re-open." R 189.

The lessee at this time seems to have interpreted the minimum royalty suspension that it applied to only a fraction of a year. Its president telegraphs Anaconda September 27, 1943, (among else):

"Leases provide obligation pay minimum royalties shall be suspended during periods where a cause such as request of War Production Board exists and obligation pay such minimum royalties shall be reduced in such proportion as period suspension bears to entire calendar year."

About 12 workmen were at the upper camp March 1, 1946 and September 1, 1946. Evidence of Nicely, R. 246. It would be a harsh suspicion of waste of public money to think that such a force was not mining.

If it was the intention of the parties to the lease that a mere purpose of the lessee to hold the mines unproductive but in readiness to serve, for years at a time, would absolve the lessee from paying the minimum royalty, why insert before and after the words "requirement, regulation, restriction, or other act of government or governments, whether legal or otherwise" thirty-eight contingencies that might happen, and if any did happen a physical impossibility to produce from the mines would arise. The unwillingness of the lessee to operate would cover any of these contingencies.

What did happen, as is apparent from the correspondence of the administrative officers, was only that the sole stockholder of the lessee concluded that a sufficient supply of needed chrome could be obtained somewhere else at less expense. It was not an event usually held to be within a vis major clause in mining leases. To make a minimum royalty clause dependent on market conditions either of demand or supply is not usually permitted by the courts.

In substance the same administrative conclusion or plan might have arisen if such a large body of high-grade chrome had been discovered in the Ben Bow development five miles away as to supply the expected need.

The "Dead Rent" provision is frequent in mining leases, as is also a vis major paragraph with many particular contingencies set out beside "catch all" phrases. It is safe to say that when these contracts are being executed,

it is the intention of both parties that the Dead Rent clause shall operate unless some event happens to prevent production that is *actually beyond the control* of the lessee and ejusdem generis of the particular events enumerated.

The courts hold that the circumstances must be considered and a reasonable interpretation reached for the particular contract before the court.

Appellant claims that a mere expressed plan of the lessee to hold the property idle, but ready to produce on short order, would allow the lessee to hold possession for 19 years without the payment of the "dead rent."

Appellees submit that such an interpretation would be so unreasonable that the courts should not hold that there was any such intention in the mind of either party when the contract was written; that if the contract were known by lessors to be subject to such construction, Mouats would not have executed it, because as to them it might have been the sale of a life estate for the first payment of \$10,000 annual rental.

The minimum royalty clause worked no hardship on the lessee (except that the war was a hardship on the Nation and every citizen). The lessee could surrender on short notice and payment of \$1,000. At length it decided to do so, as to the payment of \$1,000, but it did not surrender possession of the land voluntarily at all. The judgment ordered re-possession by Mouats. The Marshal enforced this after June 11, 1949, the date of the judgment. 397 R. RFC remained owner of the lease, R 41 (line 2 from bottom). The War did not influence RFC to hold over after its notice of termination. The War ended VJ day, August 15, 1945. The Marshal

ejected RFC for Mouats three years and ten months later. There was an act of detainer in open court. At the conclusion of the evidence November 14, 1948—

Maury asks for Writ of Restitution.

McKevitt opposes. R 356.

Only temporary conditions causing a shut-down were in the minds of the parties when paragraph 24 was placed in the contract. It ends “* * *; which is beyond the control of lessee, or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for *delay* in such performance until such cause ceases to exist.” R 31. The periods of delay (not absolution) are proportioned to calendar years. R 24.

If there had been a compulsory order “beyond control,” etc., this seemingly applied only to an excess above 2,000 tons per day production. 199 R.

The fact that a lessee may abandon when he desires, favors an interpretation that he must pay “dead rent” (or minimum royalty) so long as he holds possession. *Makins v. Shellenbarger* (Okla.) 289 Pac. 716.

Some of the questions raised by RFC are answered by

THE MONTANA LAW

When a tenant gives notice of cancellation of a lease, or that possession will be surrendered to the landlord by a certain date, a statute of Montana is as follows:

“If any tenant gives notice of his intention to quit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice.”

Sec. 8694 R. C. M., 1935.

The Supreme Court of Montana has spoken to the effect that as against public officers, the trebling feature does not apply; doubtless that would be the Montana holding as to penalty in a case involving the RFC,—there would be no trebling (and here there is no trebling), but no modification has been made that the tenant is free of liability for rent during the period of hold-over.

Another statute of Montana in the case of unlawful detainer separates damages from rent:

“The jury, or the court if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant, guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due.”

9901 R. C. M., 1935.

“Whatever remedies the lessor of any real property has against his immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he has against the assignees of the lessee, for any cause of action accruing while they are such assignees, except where the assignment is made by way of security for a loan, and is not accompanied by possession of the premises.”

Sec. 6764 R. C. M., 1935.

“The attornment of a tenant to a stranger is void unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction.”

7748 R. C. M., 1935.

"No one can take advantage of his own wrong."
8746 R. C. M., 1935.

The landlord has the option of treating the hold-over tenant as still a tenant or as a trespasser; the tenant continuing the wrong has not the election. The case cited in the brief of the RFC, *O'Connor v. United States*, 155 F. 2nd, 425, was a condemnation suit. It has no persuasive effect in an action between landlord and tenant for an unlawful detainer. There had been no preliminary agreement as to a minimum rental in the *O'Connor* case. We think that no authority can be found to the effect that where a tenant is guilty of an unlawful detainer, the election is with the tenant to class himself as a trespasser and litigate as to the value of the possession of the property during the hold-over period; that he cannot do so are the following authorities:

Clapp vs. Noble, 84 Ill. 62;

Tiffany—Landlord and Tenant, par. 213;

A. H. Fetting Mfg. Co. vs. Ada R. Waltz, et al.,
71 A. L. R., 1443;

St. Marks Ave. Corp. vs. Finkelstein, 253 N. Y.
Sup. 785;

Edwards vs. Stebins (Okla.) 238 Pac. 474;

McKnight vs. United States, 64 Court of Claims,
291.

(There is not set of Court of Claims decisions in Montana. The case is so apt that we are inquiring whether the Court's Library lacks such a set? If it does, we will send the Clerk photostatic copy obtained from West Publishing Co. of this decision.)

“Where Government gives lessor notice of surrender of premises, but continues to occupy them, lessor is entitled to a rent at stipulated rate for entire occupancy.”

The Mouats elected to have rent, as seen from the prayer of their complaint:

“For the sum of Thirty-one Thousand, Six Hundred, Sixty-six and 66/100 Dollars (\$31,666.66) for rents as aforesaid.” 13 R.

“In order that a party shall be excused from performing his contract obligation by an absolving clause contained in the contract, the excuse must not only come within the terms of such clause, but also must be reasonably beyond the power of the party to prevent,—that is, such a clause will not give a party the power arbitrarily to refuse performance, but he is under a duty to exercise a reasonable amount of care to prevent the happening of the contingency named. To excuse performance under an absolving clause in a contract, the cause relied on must also be the proximate cause of the failure to perform.”

12 Am. Jur., par. 365.

The proximate cause of failure to perform was a supply of chrome elsewhere deemed better.

We select from the many decisions relating to the interpretation of absolving clauses two that we think would interest the Court above many others; one as to a dead rent, or minimum royalty in a mining lease:

New York Coal Co. vs. New Pittsburg Coal Co.,
99 N. E. 198;

Swift & Co. vs. Columbia Ry., etc., Co., 17 Fed.
2nd, 46.

The RFC claims immunity for paying rent during the hold-over because the lease gave it the right to *extract ore from the property, as well as possession*. The argument seems to us to fall if we invert the sentence. The lease gave RFC possession of 25 mining claims, in addition to the right to extract ore.

That rent and royalty have the same meaning, see

Reynolds vs. Hanna, 55 So. 783;

Kisick vs. Bolton, (Ia.) 112 N. W. 95;

United Gas Co. v. Barrett, La. App. 179 So. 506;

Wagner Supply Co. v. Bateman, (Tex.) 118 S. W. 2nd 1052;

McIntyre, as Adm. v. Bond, (Ky.) 13 S. W. 2nd, 772;

Smith v. Schlittier (Tex.) 66 S. W. 2nd, 353;

Elsinore Oil Co. v. Signal Oil Co. Cal. App. 40 Pac. 2nd 523;

State ex rel. Susquehanna Ore Co. v. Bjornson, (Minn.) 259 N. W. 392.

Just as this Court removed the corporate veil where the United States was the owner of all the stock in the corporation, in United States v. Schofner Iron, etc., Co., 168 Fed. 2nd, 286, so the Montana Supreme Court has done in Barnes vs. Smith, 48 Mont. 308, 137 Pac. 541.

The appellees have moved the Court to dismiss the appeal of Reconstruction Finance Corporation, appellant here. We do not waive that motion; we submit that it is well taken; that this appeal is premature and should be dismissed. If the Court holds that we are in error in that regard, we submit that the judgment should be affirmed.

Respectfully submitted,

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In the United States Court of Appeals
for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, APPELLANT

v.

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLEES

AND

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLANTS

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RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE RECONSTRUCTION FINANCE
CORPORATION, APPELLEE

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MAR 23 1950

FILED

PAUL P. O'BRIEN

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12389

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, APPELLANT

v.

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLEES

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MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLANTS

v.

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, APPELLEE

*APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA*

**BRIEF FOR THE RECONSTRUCTION FINANCE
CORPORATION, APPELLEE**

QUESTION PRESENTED

Whether dwellings erected upon the leased premises by lessee became the property of lessors by virtue of a provision in the lease that upon its termination "wooden buildings" should be among the things left intact.

STATEMENT

This is a cross-appeal (R. 418-419) from the judgment below (R. 391-397). Thereby, the former lessors complain (1) of the refusal of the trial court to award them the value of 22 dwellings and of dwelling fixtures removed from the leased premises between March 1, 1946, when the lease terminated, and September 1, 1946, and (2) of the provision in the judgment (R. 396) that the Reconstruction Finance Corporation "is the owner, and entitled to the possession of all houses, buildings or structures * * * upon the Lake Placer Mining Claims, and without requirement of immediate removal."

The determinative facts are as follows:

Paragraph 22 of the lease provided (R. 30):

Promptly upon receipt of Lessee's written request, Lessors will execute and deliver to Lessee a quitclaim deed of all of Lessor's right, title and interest in and to property not to exceed 200 acres, to be designated by Lessee for use by Lessee for millsites, townsites, stock pilings and tailings disposal.

Such a deed was never requested (Fdg. XVI, R. 387-388).

However, Metals Reserve Company, the original lessee, erected upon a part of the leased premises, known as the Lake Placer Claims, 103 wooden buildings (with concrete foundations) designed to house the workers at the mine and mill and give them the stores, schools and medical facilities needed to make those dwellings habitable.¹ As of September 1, 1946, only one had been removed. By that date, the plumbing in all the structures had been removed. After that date,

¹ Hereafter, all of these buildings will be referred to as "dwellings."

21 additional dwellings were removed. The other 81 still remain.

The former lessors (cross-appellants) based their claim on paragraph 15 of the lease. So far as material, that paragraph (R. 28-29) declared:

Upon * * * the termination of this Lease * * * Lessee shall have six (6) months' additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timberings, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and *wooden buildings*² erected upon the demised premises and ore on dumps upon which royalties have not been paid.

Because the dwellings were *wooden buildings*, the former lessors found in paragraph 15 an undertaking on the part of lessee to deliver them over.

John Edward Norton, an engineer, and Arthur S. Hutchinson, a lawyer, testified to the purpose and meaning of paragraph 15. They represented the lessee, and William Mouat and his lawyers represented the lessors, in the negotiations which were concluded by the drafting and execution of the lease (R. 226). Norton and Hutchinson both testified that discussions between the negotiators made plain that paragraph 15 dealt with mine sites, "sites where you went in the ore body and opened up to develop the ore body" (R. 223; see also R. 227, 295). The "wooden buildings" mentioned in that paragraph meant the buildings which would house hoisting engines, machine shops, and the like (R. 229).

The need for lands upon which mills and dwellings could be put was also discussed in the negotiations. The lessee wanted title to the lands used for these pur-

² Italics supplied.

poses (R. 222, 223). As Hutchinson said (R. 306-307): "We told Mr. Mouat that this was going to be a very large undertaking and a great deal of money was going to be spent and we had to have so-called fee land, that is, land owned by the Government on which these expensive improvements would be placed." (See also R. 230). It was ultimately decided that 200 acres would suffice for this purpose (R. 222-223, 297).

The admission of this testimony was objected to—unsuccessfully—on the ground that paragraph 15 was so plain that it needed no explanation (R. 219-220, 295-296, 305).

Upon this point, the opinion of the trial court stated (R. 365-366):

It does not seem reasonable to assume in the absence of clear and unmistakable language to that effect that officers and Boards of the Government would undertake the expenditure of such large sums for homes of their employees on grounds used as a townsite, with the intention of making a present of such property to lessors upon the termination of the lease, and the language is by no means clear that such was their intention. The very fact that the contract provided for the conveyance of land by lessors for townsite and other purposes would seem to disclose the intent that any buildings erected thereon would become the property of lessees. * * * This question is important, and the higher court may find a different solution, but in this court's view it was not the intention that the language to be construed would apply to the homes, or residences, on the Lake Placer Claim, and that they were not intended to become the property of the plaintiffs upon the termination of the lease.

Accordingly, the trial court found (Fdg. XVI, R. 387-388):

But it was the intention of the parties that land would be furnished by the lessors for the construction of townsites and * * * that the "buildings" to be left on the premises after termination would include only ordinary wooden buildings, such as tool houses, machine houses, etc., and other structures necessarily constructed in connection with mining operations. It was not the parties' intention that buildings constructed as part of a townsite should be left on the premises upon termination of the lease.

ARGUMENT

The Lease Did Not Confer Upon the Lessors the Title to the Dwellings

The contention of the cross-appeal is that the dwellings were given to lessors by the provision in paragraph 15 of the lease whereby the lessee agreed to leave intact "wooden buildings." They argue (Br. 26-38) that the quoted term unequivocally includes every structure made of wood and that the trial court erred in permitting testimony showing it had a more limited meaning and in holding it did not embrace the dwellings in question.

Preliminarily, it may be conceded that since the dwellings had wooden walls and roofs they could be described as "wooden buildings." Moreover, in the enumeration of things that the lessee could remove, there is no word or term which would include them. To this extent paragraph 15 seems to support lessors' claim.

However, such an impression disappears upon further examination of paragraph 15 and of the cognate provisions of paragraph 22. Thus, the things (other than "wooden buildings") specified in the earlier paragraph—tools, equipment, machinery, tracks and tram-

ways (to be removed) and mine workings, and timbering ties and all excavations, foundations, wooden mine structures, wooden tramway towers and ore on dumps (to be left intact)—unmistakably pertain to the mines. By familiar rules, the remaining term, “wooden buildings,” is to be construed in that context and hence is also limited to buildings constructed for the working of the mines. *Smith v. McCullough*, 104 U.S. 25, 28-29 (1881); *Cleveland Trust Co. v. Consolidated Gas, E. L. & P. Co.*, 55 F.2d 211, 215 (C.C.A. 4, 1932); *O’Connor v. Great Lakes Pipe Line Co.*, 63 F. 2d 523, 526-527 (C.C.A. 8, 1933).

This limited meaning is confirmed by paragraph 22, requiring lessors, at the request of Metals Reserve, to quitclaim “all of Lessor’s right, title and interest in and to property not to exceed 200 acres, to be designated by Lessee for use by Lessee for millsites, townsites, stock pilings and tailings disposal.” Obviously, the buildings which would have been placed upon these townsites would have remained the property of the lessee. It goes without saying that these buildings would have been the dwellings here in question. And, since they would have remained the property of the lessee after the termination of the lease, there would have been no need for providing for their disposition after that event. Thus, the “wooden buildings” of paragraph 15 would not comprehend them. Clearly, then, the term was not used to designate these dwellings.

It is therefore apparent, contrary to lessors’ argument, that paragraph 15 is susceptible of construction and that, rightly construed, it has no application to the dwellings in question. This being so, there is no basis for lessors’ complaint that the trial court permitted testimony to this effect. That testimony merely reaffirmed the meaning which *on the face of the lease*

must be assigned to the words "wooden buildings" as used in paragraph 15. As the trial court held (Fdg. XVI, R. 387-388), these words meant "the tool houses, machine houses, etc., and other structures necessarily constructed in connection with mining operations."³

Of course, the fact that Metals Reserve erected the dwellings on the Lake Placer Claims without obtaining a quitclaim deed does not enlarge the meaning and effect of paragraph 15. Nor is there anything which would suggest that by failing to get this deed Metals Reserve manifested an intention to give lessors other structures in addition to those specified in that paragraph.

Thus, notwithstanding lessors' contrary contention (Br. 28) it is clear that the Lake Placer Claim (which comprised less than 200 acres) could have been requested by lessee as a townsite under paragraph 22. The language is unqualified: "all of Lessors' right, title and interest in and to property not to exceed 200 acres." Any land, therefore, which lessors could transfer whether or not covered by the lease could be demanded by the lessee provided it was to be used for any of the purposes named—millsites, townsites, stock pilings and tailings disposal. And since the land could be used for these purposes only, there is no basis for lessors' contention (Br. 28) that unless leased lands are excluded from the purview of the paragraph, under its guise lessee was empowered to demand the *minesites* and then to extract the ores without paying the stipu-

³ At Br. 27, lessors refer to—but do not there or elsewhere base any argument upon—paragraph 20 of the lease (R. 30) providing that anything remaining on the premises "more than six months after * * * termination shall conclusively be deemed to have been abandoned by the Lessee in favor of the Lessors." This paragraph merely emphasizes paragraph 15 and, since paragraph 15 does not apply to the dwellings in question, has no bearing here.

lated royalties. (Furthermore it should not be forgotten that this lease was procured with the object of producing vital war material and not to defraud lessors out of the royalties which lessee bound itself to pay.)⁴

Since paragraph 22 did not require that lessee demand a quitclaim deed before beginning construction—or, indeed, at any particular time thereafter—lessee's use of the Lake Placer Claims as a site for the dwellings without such a demand was consistent with its intent to retain title to the dwellings. The fact that the demand was never made cannot be converted into a change of lessee's intent. On the contrary, the removal of some of the dwellings and retention of the others make plain that the intent to retain title to these structures has persisted. The fact that a quitclaim deed of the site

⁴ At Br. 28, lessors lift out of context a portion of one of Mr. Norton's answers during their cross-examination of him and seize upon it to support their construction of paragraph 22. They say: "But Norton for R.F.C. says: 'It was our idea that this 200 acres was deeded, and that that would not be on any land covered by the lease.' " The record at this point (R. 230) is as follows:

Q. I see. And yet in spite of all of that knowledge at that time the lease came out in its present form?

A. Yes, it was our idea that this 200 acres of land was deeded and that that would not be on any land covered by the lease, and that this paragraph here that Mr. Mouat would get all the buildings, wooden buildings and structures erected around the mine entrances.

Q. Now just what exactly did you tell Mrs. May Paula Mouat?

A. Oh, Mrs. May Paula Mouat I don't remember that we told her very much.

Mr. Maury: That is all.

From the foregoing it is obvious that the questions and answers were not directed to the construction of paragraph 22, that the answers do not even incidentally shed light on the meaning of that paragraph, and that—as is shown by his swift change and termination of the cross-examination—lessors' counsel did not then ascribe to Mr. Norton's stray remark the weight he would have this Court give it now.

has not been requested merely discloses that the Government is content to have the dwellings and to let the ownership of the land on which they stand be determined without regard to the lease. Since the lessors have not been misled or otherwise disadvantaged by this policy, it affords no support for their claim.

CONCLUSION

For the foregoing reasons it is submitted that the parts of the judgment attacked by the cross-appeal should be affirmed.

Respectfully,

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MARCH 1950.

In The United States Court of Appeals

For the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

M. W. MOUAT, as trustee of an express trust, M. W. MOUAT, and M. W. MOUAT as Administrator of the Estate of May Paula Mouat, deceased,

Appellees,

and

M. W. MOUAT, as trustee of an express trust, M. W. MOUAT, and M. W. MOUAT as Administrator of the Estate of May Paula Mouat, deceased,

Appellants,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellee.

Reply Brief of M. W. Mouat, et al., Appellants

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**In The United States
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RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellee.

**Reply to Brief of
Reconstruction Finance Corporation
On Mouats' Appeal**

The RFC comments in a footnote that Mouats "do not base any argument on the provision that anything remaining on the property more than six months after termination shall conclusively be deemed abandoned to lessors."

We are not prone to argue for the self-evident. Mouats specified the Trial Court's failure to enforce it as error,

Specification No. 5, Br. 15. It is so apparent that argument might irk the Appellate Court.

One fallacy of the Brief of RFC is that under Montana law the buildings on the leasehold were real estate. They become the property of the lessors the day the lease terminated, February 28, 1946—March 1, 1946, unless there were a special written privilege to remove them. There was none.

Hauf vs. School District No. 1, 52 Mont. 395; 158 Pac. 315.

We do not recall ever seeing a conveyance of land, no matter how far the value of the building on it exceeded the value of the bare land, where the description was more than of the land, without mention of the building.

We ask leave to add to Mouats' first brief on their appeal, on the question of the measure of damages for strip, after the lease ended on notice from RFC;

Slane vs. Curtis (Wyo.) 286 Pac. 372.
Rehearing denied, 288 Pac. 12.

The injured party is entitled to have the most favorable rule enforced.

Park vs. Northport S. & R. Co., (Wash.) 92 Pac. 442.

15 Amer. Jur., Damages, 116, p. 526.

No other rule has been suggested by RFC in this Court, or in the Trial Court.

Respectfully submitted,

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In the United States Court of Appeals
for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION,
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v.

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RECONSTRUCTION FINANCE CORPORATION, A CORPORATION,
APPELLEE

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION,
APPELLANT, IN OPPOSITION TO THE MOTION TO
DISMISS

FILED

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,389

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APPELLANT**

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**MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND
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**RECONSTRUCTION FINANCE CORPORATION, A CORPORATION,
APPELLEE**

*UPON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA*

**BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION,
APPELLANT, IN OPPOSITION TO THE MOTION TO
DISMISS**

ARGUMENT

Appellees' motion to dismiss certainly establishes what is not in controversy: Their timely "Motion to Make Additional Findings" (R. 397-398) pursuant to

Rule 52(b), F.R.C.P., 308 U.S. 65, extended the time for taking their appeal. Rule 73(a), F.R.C.P., 335 U.S. 933-934. And see e.g., *Kingman v. Western Manufacturing Co.*, 170 U.S. 675 (1898); *Morse v. United States*, 270 U.S. 151, 154 (1926); and *Zimmern v. United States*, 298 U.S. 167, 169 (1936) cited by appellees.

But it is not apparent just why appellees' opportunity—if futile—invocation of Rule 52(b) and the consequent enlargement of their appeal time should make RFC's earlier appeal "premature" in the sense that it will not serve to carry to the Court for review the judgment against RFC. Yet, for aught that appears, the motion to dismiss the appeal rests on this idea. In other words, it seems to be appellees' view that during the period in which they were not required to appeal, RFC *could not*.

There is no relation between RFC's appeal and the proceedings instituted by lessors after the trial court judgment. Accordingly, those proceedings have no effect on that appeal. When it was noted, the judgment appealed from had been entered. Then, as now, it required RFC to pay appellees \$38,722.10 with interest. Since the liability was fixed, the judgment was final. Cf. *Collins v. Miller*, 252 U.S. 364 (1920); *Louisiana Nav. Co. v. Oyster Comm.*, 226 U.S. 99, 101 (1912); *Sheppy v. Stevens*, 200 Fed. 946 (C.C.A. 2, 1912) cited by appellees. Unlike a motion for a new trial, nothing in appellees' motion for additional findings sought in any way to upset that judgment.¹ Consequently, the trial court lacked power to do so. *Mar-*

¹ The probable purpose of the motion was to procure findings as to the value of the removed property so that, if this Court held the removals wrongful, it could not have ordered a new trial but would have been required to direct the trial court to enter judgment for the additional amounts. *United States v. Stamey*, 48 F. 2d 150, 152 (C.C.A. 9, 1931).

shall's U.S. Auto Supply v. Cashman, 111 F. 2d 140, 142 (C.C.A. 10, 1940), certiorari denied 311 U.S. 667; *Freid v. McGrath*, 133 F. 2d 350, 355 (D.C. App. 1942). Thus, even if the motion had been granted, RFC's liability would have remained unchanged. Therefore, the pendency of the motion is no reason why RFC should not have appealed. Indeed there was no excuse for further delay.

The circumstance that lessors' appeal period had not commenced to run is immaterial. The two appeals are not dependent on each other. The RFC appeal could have been heard and determined if lessors had never appealed. Obviously, then, its disposition by this Court did not have to await the trial court's ruling on lessors' motion. Consequently, the fact the appeal was taken before that ruling was made does not render it ineffective.

For all practical purposes, the situation presented here is indistinguishable from that which would have obtained if instead of bringing this action lessors had brought two, which were consolidated for trial, the first for royalties allegedly due and damages for holding over (on which, as here, the trial court entered judgment for lessors) and the second for the value of property asserted to have been illegally removed (as to which the court denied recovery). None would suppose that if lessors asked the trial court to amplify the findings in respect of their losing cause of action, RFC would have been powerless to appeal from the judgment against it on the other cause of action. So in the case at bar, in a legally indistinguishable situation, RFC is not disabled by the pending motion from taking an appeal.

The foregoing example raises the question whether the RFC appeal would not have been too late if it had been delayed until after the trial court's ruling on the

lessors' motion. Thus, in the supposed cases, it is probable that RFC would have been obliged to appeal within 60 days of the judgment adverse to it. *Continental Casualty Co. v. United States*, 167 F. 2d 107 (1948). There, this Court held that the appeal period was not tolled by a motion for new trial made by "adversary parties" but that it was tolled by such a motion made by co-defendants if, as a necessary result of granting the motion, the entire judgment would be set aside. So here, there is basis for the view that the motion under Rule 52(b) by lessors, "adversary parties" merely for additional findings would not extend the time for RFC to appeal. If this is so, then its appeal, far from being "premature," was taken within the only available period. But whether so or not, caution dictated that the notice of appeal be filed at that time.

Of course, appellant could have prevented the controversy precipitated by the motion to dismiss by filing after the trial court's disposition of the irrelevant motion *another* notice of appeal from the *same* judgment. And in the light of the argument thus provoked, it is evident that as a further precaution this should have been done. But whereas a failure to take an appeal in the first instance justifiably might have subjected appellant to the penalty of dismissal visited on those who are laggards in the appellate process, the omission to renew the appeal—undisturbed during an interval when nothing that occurred could change the judgment appealed from—does not warrant a dismissal of that appeal for that reason or any other. Entertaining that appeal does not delay justice, inconvenience the appellate court or keep the appellee in doubt of the possibility of further litigation. On the other hand, dismissal of the appeal would kill a good

cause on the sheerest of technicalities. Certainly then there is no merit in the motion to dismiss.

Moreover, the circumstance that an appeal is taken while a motion in the case is pending in the trial court loses significance when the motion is disposed of without affecting the judgment appealed from. Thus in *Luckenbach S.S. Co. v. United States*, 272 U.S. 533 (1926), the Court declined to dismiss an appeal from the Court of Claims applied for during the pendency of a motion for new trial and for amended findings and allowed after denial of that motion. The Court, speaking through Mr. Justice Van Devanter said (p. 535):

The only infirmity suggested is that the application was premature in that it was made before the motion for a new trial and amended findings was disposed of. It is true that with that motion pending the judgment was not so far final as to cause time to run against the right to appeal, *United States v. Ellicott*, 223 U. S. 524, 539; but while the application was thus premature it was not a nullity.

Accordingly, it was held that the application could be given effect after disposition of the motion for new trial. As the Court there said, while motion for new trial was pending, the judgment was "not so far final" as to cause time to run against the right to appeal, and the application although "premature * * * was not a nullity." Similarly, here, even if the pendency of the motion for additional findings affected the judgment against RFC, the finality thereof was not destroyed and the appeal was not a nullity. With the overruling of the motion it became effective.²

² The fact that at that time an appeal had to be applied for and allowed does not distinguish the *Luckenbach* case from the one at bar. The significant matter was the application "because an

Reference is made (Br. 8) to *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944). That case simply held that allowance of a premature appeal did not deprive the district court of jurisdiction to allow a subsequent and timely appeal. Since two notices of appeal had been filed there, the decision resulted in sustaining an appeal rather than depriving the party of any review as urged by appellees here. The *Crescent* case simply held that appellant could rely on the latter appeal "and not run the risk of losing an appellate review on the appeal first allowed" (323 U.S. at p. 178). The remark there made (p. 177) that the first appeal was premature "(and therefore a nullity)" must, under familiar principles, be read with reference to the subject matter then under discussion, which was the question whether the premature appeal deprived the court of jurisdiction to allow a second appeal. While the premature appeal may be a nullity in that regard, it does not follow that it had no effect for any purpose. On the contrary, the *Luckenbach* decision establishes its effectiveness after the motion for a new trial is denied. Since the *Crescent* case was not dealing with the problem presented by the *Luckenbach* case and here, the parenthetical remark above quoted should not be construed as overruling *sub silentio* the *Luckenbach* decision.

order of a court, or a judge allowing an appeal, is in effect nothing more than an order to send the transcript of the record to the appellate court." *Hudgins v. Kemp*, 18 How. 530, 538 (1855). Thus, the filing of the notice of appeal in this case is the equivalent of the filing of the application for appeal in the *Luckenbach* case. So the Court of Appeals for the District of Columbia held in *Hamilton v. United States*, 140 F. 2d 679, 680 (1944).

CONCLUSION

For the foregoing reasons, it is submitted that the motion to dismiss should be denied.

Respectfully,

A. DEVITT VANECH,
Assistant Attorney General.

JOHN B. TANSIL,
*United States Attorney,
Billings, Montana.*

JOHN F. COTTER,
*Attorney, Department of Justice,
Washington, D. C.*

APRIL 1950.

No. 12390

United States
Court of Appeals
For the Ninth Circuit.

KAUFMAN-BROWN POTATO COMPANY, a
Partnership Composed of Charles H. Kauf-
man and Albert H. Brown, CHARLES H.
KAUFMAN and ALBERT H. BROWN,

Appellants,

vs.

WAYNE LONG, as Trustee in Bankruptcy of the
Estates of Gerry Horton and J. D. Althouse.
Doing Business as Gerry Horton Company, a
Co-Partnership; Gerry Horton and J. D. Alt-
house. Doing Business as Gerry Horton Farms,
a Co-Partnership; GERRY HORTON, an In-
dividual, and J. D. ALTHOUSE, an Indi-
vidual,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Northern Division.

FILED

JUN 10 1950

PAUL P. OWREN,
CLERK

No. 12390

United States
Court of Appeals
For the Ninth Circuit.

KAUFMAN-BROWN POTATO COMPANY, a
Partnership Composed of Charles H. Kauf-
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dividual, and J. D. ALTHOUSE, an Indi-
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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellees:

HARVEY, JOHNSTON, BAKER &
PALMER,
359 Habermelde Bldg.,
Bakersfield, Calif.

In the District Court of the United States for the
Southern District of California Northern Division

No. 6180

In the Matter of:

GERRY HORTON AND J. D. ALTHOUSE, doing
business as GERRY HORTON COMPANY, a
co-partnership, GERRY HORTON and J. D.
ALTHOUSE doing business as GERRY HORTON
FARMS, a co-partnership, GERRY
HORTON, an individual, and J. D. ALT-
HOUSE, an individual,

Alleged Bankrupts.

INVOLUNTARY PETITION BY THREE CREDITORS

The verified petition of Kaufman, Brown Potato
Company, a co-partnership; Earl Cecil and J. Deacy
Brown doing business as Rosedale Warehouse Com-
pany, a co-partnership; and John Lewis respectfully
shows:

I.

That at all times herein mentioned Gerry Horton
and J. D. Althouse were, and now are doing business
as a co-partnership under the firm name of Gerry
Horton Company, by virtue of the laws of the State
of California.

II.

That at all times herein mentioned Gerry Horton
and J. D. Althouse were and now are doing business
as a co-partnership under the name of Gerry Horton

Farms under and by virtue of the laws of the State of California, and for the greater portion of six (6) months next preceding the date of the filing of this petition said co-partnerships had their principal place of business at 201 Sill Building, Bakersfield, Kern County, California, and said individuals, Gerry Horton and J. D. Althouse resided in and had their principal place of business in the City of Bakersfield, County of Kern, State of California.

III.

That said co-partnerships and said individuals owe debts [2*] in the amount of more than One Thousand Dollars (\$1000.00) to the petitioning creditors and other creditors.

IV.

That Kaufman Brown Potato Company is a co-partnership consisting of Charles H. Kaufman and Albert H. Brown, doing business as Kaufman Brown Potato Company, with their principal place of business in the City of Chicago, State of Illinois, and with their principal place of business in the State of California in Kern County, California.

V.

That the nature and amount of said creditor's claims is that within the past year said creditor advanced monies to the alleged bankrupts in the sum of Twenty-three Thousand, Four Hundred Seventy-nine and 79/100 Dollars (\$23,479.79). That the

* Page numbering appearing at bottom of page of original certified Transcript of Record.

entire sum of Twenty-three Thousand, Four Hundred Seventy-nine and 79/100 Dollars (\$23,479.79) remains now due, owing and unpaid from the alleged bankrupts to Kaufman Brown Potato Company, a co-partnership. That of said sum of Twenty-three Thousand Four Hundred Seventy-nine and 79/100 Dollars (\$23,479.79), the sum of Twenty-two Thousand Five hundred Ninety-four and 82/100 Dollars (\$22,594.82) was originally secured by two (2) crop mortgages upon a crop of potatoes, but that the alleged bankrupts have disposed of said crop of potatoes without accounting to the Kaufman Brown Potato Company and accordingly have disposed of the security.

That the sum of Eight Hundred Eighty-four and 97/100 Dollars (\$884.97) is an unsecured obligation. That both of said obligations are fixed as to liability and liquidated in amount.

VI.

That at all times herein mentioned, Earl Cecil and J. Deacy Brown were doing business as a co-partnership under the firm name of Rosedale Warehouse Company, under and by virtue of the laws of the State of California, and have their principal place of business in Bakersfield, County of Kern, State of California. That said co-partnership is an unsecured creditor of the above named bankrupts.

VII.

That the nature and amount of said creditor's claim is as follows:

That within the past year said co-partnership furnished the above named alleged bankrupts merchandise of the agreed and reasonable market value of the sum of Three Thousand Five Hundred Eleven and 75/100 Dollars (\$3511.75). That no part of said sum has been paid and that the entire sum now remains due, owing and unpaid from the alleged bankrupts. That said claim is an unsecured claim fixed as to liability and liquidated in amount.

VIII.

That John Lewis is an individual residing at 1017 Twenty-fifth Street, Bakersfield, California, and is a creditor of the alleged bankrupts on an unsecured claim, fixed as to liability and liquidated in amount. That the nature and amount of said creditor's claim is that within the past year said creditor furnished merchandise to the alleged bankrupts of the agreed and reasonable market value of Five Hundred Eighteen and 68/100 Dollars (\$518.68). That no part of said sum has been paid and the entire sum remains now due, owing and unpaid from the alleged bankrupts to John Lewis.

IX.

That within four (4) months next preceding the date of filing this petition, to wit: during the month of July 1944, the alleged bankrupts committed acts of bankruptcy in that knowing that they were in an insolvent condition they did make payment in full of accounts to certain creditors and did execute a mortgage upon certain of their equipment, in order

to secure the claim of one D. M. Wasson, a creditor, in the amount of Seven Thousand Two Hundred Fifty and 40/100 Dollars (\$7250.40), and did suffer an attachment of certain of their property in an action in [4] the Superior Court of the State of California in and for the County of Kern, brought by one J. W. McNeil to recover the sum of Twelve Thousand Five Hundred Dollars (\$12,500.00).

That said payments, mortgage and attachment lien constitute a preference of said creditors over the other creditors and constitutes a preference under the Bankruptcy Act in that it permits said creditors, if said preference is allowed to stand, to receive a larger percent of their claims than the other creditors of the alleged bankrupts, including your petitioners, and that the same was given with the intent to prefer said creditors over the other creditors of the alleged bankrupts including your petitioners.

XI.

And for a further act of bankruptcy your petitioners allege that the alleged bankrupts have allowed the Kern County Bank of Oildale, California to apply the sum of approximately Ten Thousand Dollars (\$10,000.00) to an unsecured obligation to said bank within the past ten (10) days, and that said bankrupts have allowed said Kern County Bank of Oildale, California, to take possession of certain of its assets and equipment to be liquidated by said bank, the value of which is in excess of any secured indebtedness held by said bank, and by reason

thereof said bank has possession of a substantial equity in said equipment which is an asset of said alleged bankrupts.

XII.

And for a further and additional act of bankruptcy your petitioners allege that within four (4) months last past the alleged bankrupts committed other acts of bankruptcy in that they did within said period of time transfer and pay over certain of their assets to certain of their creditors with intent to prefer said creditors over their other creditors, and as a result of said payments to said creditors as hereinabove alleged, said [5] creditors receiving the payments and assets will receive a larger portion of their obligations than will your petitioners and the other creditors of the alleged bankrupts.

That said transfers amount to a preference as defined by the Bankruptcy Act. That the exact names of the persons to whom said transfers and payments were made are unknown to your petitioners, and upon ascertaining their true names your petitioners will ask leave to amend this additional act of bankruptcy by inserting the true names of said persons.

Wherefore your petitioners pray that service of this petition with subpoena be made upon the alleged bankrupts provided by the Acts of Congress relating to bankruptcy, and that the alleged bankrupts

be adjudged by this Court to be bankrupts within the purview of said Acts.

KAUFMAN BROWN POTATO
COMPANY,

By /s/ PHILIP BANOVITZ,

Authorized Agent.

ROSEDALE WAREHOUSE

COMPANY, a co-partnership,

By /s/ B. H. OWEN,

Authorized Agent.

/s/ JOHN LEWIS.

KENDALL, HOWELL &

DEADRICH,

By /s/ DONALD KENDELL,

Attorney for Petitioning

Creditors. [6]

Southern District of California,

State of California, County of Kern—ss.

Philip Banovitz being first duly sworn deposes and says:

That Kaufman Brown Potato Company, a co-partnership, a petitioner in the above entitled bankruptcy matter, is a co-partnership, and that affiant is the duly authorized agent thereof and makes this verification for and on behalf of said co-partnership; that affiant has read the foregoing involuntary petition by three (3) creditors and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his

information and belief and as to those matters he believes them to be true.

/s/ PHILIP BANOVITZ.

Subscribed and sworn to before me this 4th day of August 1944.

[Seal] /s/ REBA NEATE,
Notary Public in and for the County of Kern, State
of California.

Southern District of California,
State of California, County of Kern—ss.

B. H. Owen being first duly sworn deposes and says:

That Rosedale Warehouse Company, a co-partnership, a petitioner in the above entitled bankruptcy matter is a co-partnership, and that affiant is the duly authorized agent thereof and makes this verification for and on behalf of said co-partnership; that affiant has read the foregoing involuntary petition by three (3) creditors and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters he believes [7] them to be true.

/s/ B. H. OWEN.

Subscribed and sworn to before me this 4th day of August 1944.

[Seal] /s/ REBA NEATE,
Notary Public in and for the County of Kern, State
of California.

Southern District of California,
State of California, County of Kern—ss.

John Lewis being first duly sworn deposes and says:

That he is one of the petitioners named in the foregoing involuntary petition by three (3) creditors; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters he believes them to be true.

/s/ JOHN LEWIS.

Subscribed and sworn to before me this 4th day of August 1944.

[Seal] /s/ REBA NEATE,
Notary Public in and for the County of Kern, State
of California.

[Endorsed]: Filed Aug. 5, 1944. [8]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 5th day of August, 1944.

Whereas, a petition was filed in this court on the 5th day of August, 1944, against Gerry Horton Company, and Gerry Horton Farms, a co-partnership, composed of Gerry Horton and J. D. Althouse, and Gerry Horton and J. D. Althouse, indi-

vidually, alleged bankrupts above named, praying that they be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Waldo R. Bergman, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Gerry Horton Company, and Gerry Horton Farms, a co-partnership, composed of Gerry Horton and J. D. Althouse, and Gerry Horton and J. D. Althouse, individually, shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ PAUL J. McCORMICK,
District Judge.

[Endorsed]: Filed Aug. 5, 1944. [9]

[Title of District Court and Cause.]

ORDER OF ADJUDICATION OF BANK-
RUPTCY AND ORDER FOR FILING OF
SCHEDULES IN BANKRUPTCY

At Bakersfield in said Southern District of California on the 15th day of August, 1944, before the Honorable Waldo R. Bergman, Referee in Bankruptcy, the petition of Kaufman Brown Potato

Company, a co-partnership, Earl Cecil and J. Deacy Brown doing business as Rosedale Warehouse Company, a co-partnership, and John Lewis, praying that Gerry Horton Company and Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, and Gerry Horton and J. D. Althouse, individuals, be adjudged bankrupts within the true intent and meaning of the Acts of Congress related to bankruptcy, having been heard and duly considered, the said Gerry Horton Company and Gerry Horton Farms, a co-partnership, composed of Gerry Horton and J. D. Althouse, and Gerry Horton, an individual, and J. D. Althouse, an individual, are hereby declared and adjudged bankrupt accordingly.

It Is Further Ordered that the said bankrupts prepare and file their schedules in bankruptcy setting forth all of their assets and liabilities in accordance with the laws relating to bankruptcy, with the above-entitled Court on or before the 21st day of August, 1944.

Witness the Honorable Referee of said Court and the seal thereof at Bakersfield in said district on the 15th day of August, 1944.

/s/ WALDO R. BERGMAN,
Referee in Bankruptcy.

Filed 8/15/44.

/s/ WALDO R. BERGMAN,
Referee.

[Endorsed]: Filed Aug. 26, 1944. [10]

[Title of District Court and Cause.]

ORDER APPROVING TRUSTEE'S
BOND

At Bakersfield, California, in said district, on the 19th day of September, 1944.

The above-named Gerry Horton Company and Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, and Gerry Horton and J. D. Althouse, individuals, having been adjudged bankrupts by a petition filed against them on the 5th day of August, 1944, and Wayne Long of Bakersfield, California, in said district, having been duly appointed trustee of the estate of said bankrupts and having duly qualified as such trustee by giving a bond with sufficient sureties for the faithful performance of his duties in the amount fixed by the order of this Court, to wit: Five Thousand Dollars (\$5,000.00);

It Is Hereby Ordered that the said bond be, and it is hereby, approved.

Dated: September 19, 1944.

WALDO R. BERGMAN,
Referee in Bankruptcy.

CERTIFICATE OF TRUE COPY

United States of America,
Southern District of California,
Northern Division—ss.

William A. McGugin, Referee in Bankruptcy in
and for the County of Fresno, State of California,

in and for the said district, do hereby certify that the foregoing is a true and correct copy of Order Approving Trustee's Bond in the above-entitled matter as the same appears of record in the proceedings in said matter now on file in my office.

In Witness Whereof, I have hereunto set my hand this 16th day of July, 1948.

/s/ WILLIAM A. McGUGIN,
Referee in Bankruptcy. [11]

[Title of District Court and Cause.]

PETITION FOR ORDER AMENDING, MODIFYING AND CHANGING ORDER OF ADJUDICATION AND PETITION FOR ORDER TO SHOW CAUSE DIRECTED AGAINST PARTNERS

To The Honorable Paul J. McCormick, Judge of the United States District Court, Southern District of California, Northern Division.

The verified petition of Wayne Long respectfully represents to the Court herein as follows:

I.

That he is the duly appointed, qualified and acting Trustee of the estates of the above bankrupts.

II.

That on the 5th day of August, 1944, an involuntary petition in bankruptcy was filed at the hour

of 10:10 A.M., and that a copy of said petition is attached hereto and marked Exhibit "A", and made a part hereof.

That an Order of General Reference was made by the Honorable Paul J. McCormick, one of the Judges of the above-entitled Court, which was filed in the above-entitled Court on the 5th day of August, 1944 at 11:30 A.M., a copy of which is attached hereto, and marked Exhibit "B". [12]

That on August 9, 1944, the Honorable Waldo R. Bergman, Referee in Bankruptcy, to whom the above matter was referred by the Judge, made an order authorizing Maurice E. Tice, Constable of the Sixth Township, County of Kern, State of California, to serve subpoenas on the alleged bankrupts. That between the 8th day of August, 1944, and the 10th day of August, 1944, service was made upon J. D. Althouse and Gerry Horton individually, and upon said parties as Gerry Horton Farms, a co-partnership, and thereafter the Referee on the 15th day of August, 1944 made an order of adjudication of bankruptcy and order for filing of schedules in bankruptcy, a copy of which is attached hereto, marked Exhibit "C", and which order adjudicated Gerry Horton Company and Gerry Horton Farms, a co-partnership, composed of Gerry Horton and J. D. Althouse, and Gerry Horton, an individual, and J. D. Althouse, an individual, as bankrupts.

III.

That your Trustee is informed and believes and

therefore alleges that the co-partnership of Gerry Horton Farms, one of the above bankrupts, at the time of the filing of the petition in bankruptcy was composed of Gerry Horton, J. D. Althouse, and the partnership of Kaufman-Brown Potato Company, which partnership is composed of Charles H. Kaufman and Albert H. Brown, and was not composed of only Gerry Horton and J. D. Althouse, as is set forth in the involuntary petition and the order of adjudication therein. That on or about the 22nd day of January, 1944, the said Gerry Horton and J. D. Althouse, as co-partners doing business under the firm name and style of Gerry Horton Farms, and Charles H. Kaufman and Albert H. Brown, doing business under the firm name and style of Kaufman-Brown Potato Company, entered into a contract, a copy of which is attached hereto and marked Exhibit "D"; and that on or about the 16th day of November, 1943, the same person entered into a contract, attached hereto is a copy of said contract, marked Exhibit "E", which contract provides for the operation of the property of Gerry Horton Farms and the manner in which the profits would be divided among the parties, and the manner and percentage of which the losses were to be paid by the parties. That thereafter the said Gerry Horton, J. D. Althouse and the partnership of Kaufman-Brown Potato Company, composed of Charles H. Kaufman and Albert H. Brown, maintained and operated the business of Gerry Horton Farms, one of [13] the above bankrupts, in accordance with the

terms and conditions as set forth in said agreements, copies of which are attached hereto and marked Exhibits "D" and "E". That during the operations of said business and prior to the filing of the bankruptcy petition herein, the said partnership of Gerry Horton Farms, composed of said Gerry Horton, J. D. Althouse and Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, became indebted to various and sundry creditors of said bankrupt estate. That petitioner is further informed and further alleges upon information and belief that the originals of said contracts and agreements, marked Exhibits "D" and "E", were shown to various and divers parties, and thereafter said persons advanced credit to said partnership based upon the faith and credit of not only Gerry Horton and J. D. Althouse, but also Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown. That said Kaufman-Brown Potato Company, a co-partnership, composed of Charles H. Kaufman and Albert H. Brown has advised various and divers persons that they were partners with said Gerry Horton and J. D. Althouse in the partnership known as Gerry Horton Farms. That at the time the involuntary petition in bankruptcy was signed by Kaufman-Brown Potato Company, and said Kaufman-Brown Company, composed of said persons as heretofore mentioned, knew that they were partners and/or joint venturers with Gerry Horton and J. D. Althouse, a co-partnership

being operated under the name of Gerry Horton Farms, and said Charles H. Kaufman and Albert H. Brown falsely and fraudulently represented to other creditors that Gerry Horton and J. D. Alt-house were the only partners in said Gerry Horton Farms, and did not inform the other creditors who signed the involuntary petition, nor did they inform the Court of the true fact that they, as partners doing business under the firm name and style of Kaufman-Brown Potato Company, was a partner of the co-partnership of Gerry Horton Farms.

IV.

That by reason of the agreements marked Exhibits "D" and "E", and by reason of the conduct of Kaufman-Brown Potato Company, a co-partnership, composed of Charles H. Kaufman and Albert H. Brown, and each of them, the said co-partnership of Kaufman-Brown Potato Company and Charles H. Kaufman and Albert H. Brown, each became individually and severally liable for the payment of the debts and [14] obligations created by said Gerry Horton Farms, and in the maintenance and operation of its business in Kern County, California; and that Charles H. Kaufman, Albert H. Brown, and the co-partnership of Kaufman-Brown Potato Company, composed of said persons, and each of them are individually liable under and by virtue of the laws of the State of California for the partnership debts created by Gerry Horton Farms, and accordingly under the provisions of the Bankruptcy Act, to-wit: Section

V thereof, said Kaufman-Brown Potato Company, a co-partnership, Charles H. Kaufman and Albert H. Brown are deemed to be and are general partners of said Gerry Horton Farms, one of the above bankrupts.

V.

That Gerry Horton individually had no assets other than those exempt, and that J. D. Althouse had no assets other than those exempt, and that all of the assets of Gerry Horton Farms, a bankrupt, and Gerry Horton Company, a co-partnership, coming into the possession and under the control of your Trustee that has any value has been liquidated and reduced to cash, and the total amount of cash on hand is \$14,642.58, and that no dividend has been paid to creditors, and that no fees have been paid to your Trustee, nor to the former attorneys for the Trustee, nor the present attorney for the Trustee, and that the Referee has not determined the amount of said sum of cash on hand that belongs to the Gerry Horton Farms, and the amount that belongs to Gerry Horton Company; that your Trustee believes that not over \$1025.00 belongs to Gerry Horton Farms, and that the balance of said cash on hand belongs to Gerry Horton Company, and a total of \$13,301.29 in general claims have been filed against Gerry Horton Farms, not including the alleged claim of Kaufman-Brown Potato Company in the sum of \$23,479.79, to which the Trustee has filed objection, and that your Trustee does not have on hand a sufficient amount of money to pay the

creditors of the Gerry Horton Farms in full after the Court has allowed compensation to your Trustee and to the prior attorneys for the Trustee, and the present attorney for the Trustee; and your Trustee alleges upon information and belief that it will take \$15,301.29 in addition to the cash on hand to pay the expenses of administration and the creditors in full. [15]

VI.

That your petitioner is further informed and believes and therefore alleges that Charles H. Kaufman, Albert H. Brown and Kaufman-Brown Potato Company, a co-partnership composed of said parties, both by reason of their acts and their conduct and in particular by surrendering of the assets of Gerry Horton Farms to your trustee for the administration thereon in this estate, and the filing of certain proof of debt claimed in the proceedings herein, and by the filing of the involuntary petition in bankruptcy, consented to the administration of the partnership property and the assets in bankruptcy proceedings, and accordingly the Court herein having acquired jurisdiction of the above-named bankrupt Gerry Horton Farms, has by virtue of the provisions of the Bankruptcy Act jurisdiction of all of the general partners and of the administration of the partnership, and of the individual properties of the individual partners.

VII.

That Kaufman-Brown Potato Company, a co-partnership doing business in the State of Illinois, having its place of business at 64 South Watermarket, Chicago, Illinois, and also doing business with the State of California, having its principal place of business at 9381 Olympic Boulevard, Beverly Hills, California; and that its agent and representative in the State of California, is Philip Banovitz, and that Gerry Horton Farms, a co-partnership, operated and had its principal place of business in Kern County, State of California, and at no other place, and at the time of the filing the petition in bankruptcy, both Gerry Horton and J. D. Althouse were residents of Kern County, California, and have resided in said County of Kern, State of California for a period of over six months prior to the filing of said bankruptcy.

Wherefore, your Trustee prays that an order to show cause be issued directed against Charles H. Kaufman, Albert H. Brown and Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, requiring them to appear before this Court on a day certain, and to show cause, if any they have, why an order should not be made and entered herein ordering adjudging and decreeing that each of them is a general partner of Gerry Horton Farms, one of the above-entitled bankrupts, and why a further order should not be [16] made and entered herein amending, modifying and changing the order of

adjudication herein in conformity to the foregoing, and for such other and further relief as to the Court may seem just and proper.

/s/ WAYNE LONG,

Trustee of the above
bankrupts.

/s/ C. W. JOHNSTON,

Attorney for Trustee.

State of California,
County of Alameda—ss. '

Wayne Long, being first duly sworn deposes and says:

That he is the Petitioner named in and who makes the foregoing Petition; that he has read said Petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to such matters, that he believes them to be true.

/s/ WAYNE LONG.

Subscribed and sworn to before me this 6th day of November, 1946.

[Seal] Illegible

Notary Public in and for the County of Alameda,
State of California.

My Commission Expires February 11, 1947. [17]

Exhibits A, B, C, and D to the Foregoing Petition

“Exhibit “A” to this Petition, being a copy of the involuntary petition in bankruptcy, is not here set forth in that the original thereof is contained in the said record on appeal, pages 2 to 10, thereof;

Exhibit “B” to this Petition, being a copy of Order of References, is not here set forth in that the original thereof is contained in the said record on appeal at page 10, thereof;

Exhibit “C” to this Petition, being a copy of the Order of Adjudication of Bankruptcy and Order for Filing of Schedules in Bankruptcy, is not here set forth in that the original thereof is contained in the said record on appeal at page 11, thereof;

Exhibit “D” to this petition, being a copy of Agreement dated the 22nd day of January, 1944, is not set forth in that the original thereof is contained in the said record on appeal as respondent’s Exhibit “D”; and

Exhibit “E” to this petition, being a copy of Agreement dated the 16th day of November, 1943, is not set forth in that the original thereof is contained in the said record on appeal as respondent’s Exhibit “E”.

[Endorsed]: Filed Nov. 15, 1946. [17-B]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the verified petition of Wayne Long, Trustee for Gerry Horton Farms, one of the above bankrupts, and good cause appearing therefrom, and upon motion of C. W. Johnston, attorney for the Trustee, and no adverse interest appearing thereat:

It Is Ordered that Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, appear before the Honorable Waldo R. Bergman, one of the referees of this court, both as a referee and as special master, at 130 Morgan Building 1711 Chester Avenue, Bakersfield, California, on the 19th day of December, 1946, at the hour of 10 o'clock A.M. thereof, to show cause if any they have why an order should not be made and entered herein ordering, adjudging and decreeing that each of them is a general partner of Gerry Horton Farms, one of the above-entitled bankrupts, and why a further order should not be made and entered herein amending, modifying and changing the order of adjudication herein in conformity with the petition herein. [38]

It Is Further Ordered that said persons are directed to file such answer or other pleadings as they deem proper within five days of the hearing herein, serving a copy thereof upon counsel for the trustee.

It Is Further Ordered that the referee and special

master herein shall hear and determine said matter and shall make his findings, conclusions of law and the order thereon.

It Is Further Ordered that the petition and order to show cause herein may be served upon the aforementioned persons by serving a copy thereof upon their attorneys of record as they appear in the proceedings herein, not later than ten days prior to the hearing of the Order to Show Cause herein.

Dated: This 15th day of November, 1946.

/s/ LEON R. YANKWICH,

Judge of U.S. District Court.

[Endorsed]: Filed Nov. 15, 1946. [39]

[Title of District Court and Cause.]

ANSWER TO ORDER TO SHOW CAUSE

Now comes Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown who for an answer to the Trustee's Petition of Order Amending, Modifying and Changing Order of Adjudication and Petition for Order to Show Cause Directed Against Partners admit, deny and allege as follows:

I.

Admit the matters set forth in Paragraphs I and II.

II.

Deny each and every allegation contained in paragraph III save and except that as follows:

“That on or about the 22nd day of January, 1944, the said Gerry Horton and J. D. Althouse, as co-partners doing business under the firm name and style of Gerry Horton Farms, and Charles H. Kaufman and Albert H. Brown doing business under the firm name and style of Kaufman-Brown Potato Company, [40] entered into a contract, a copy of which is attached hereto and marked Exhibit D; and that on or about the 16th day of November, 1943 the same persons entered into a contract, attached hereto is a copy of said contract marked Exhibit E.”

III.

Deny each and every allegation contained in paragraph IV.

IV.

Deny the following allegations contained in Paragraph V:

1. That Gerry Horton individually had no assets other than those exempt.

2. That J. D. Althouse had no assets other than those exempt.

3. That all of the assets of Gerry Horton Farms, a bankrupt, and/or Gerry Horton Company, a co-partnership coming into the possession and/or under the control of your trustee that have any value have been liquidated and/or reduced to cash.

4. That it will take \$15,301.29 or any other sum which cannot be realized from the assets of the adjudicated bankrupts in addition to the cash on hand to pay the expenses of administration and the creditors in full.

V.

Allege that the trustee herein has failed and neglected to take appropriate action to recover upon the following assets of the adjudicated bankrupts;

1. Claim against Morris & Larkin for failure to furnish water.

2. Claim against Morris & Larkin for a refund of rent.

3. Claim against wife of J. D. Althouse for property transferred to her by J. D. Althouse.

VI.

Deny each and every allegation contained in Paragraph VI.

VII.

Deny the allegations of Paragraph VII as to this partnership having its principal place of business at 9381 Olympic Boulevard, [41] Beverly Hills, California and allege that the principal place of business of this partnership is at 64 South Water-market, Chicago, Illinois.

VIII.

Allege that all of the obligations incurred in connection with the contracts marked Exhibits E and F have been paid in full, save and except those due to Kaufman-Brown Potato Company.

Wherefor, Kaufman-Brown Potato Company prays that said order to show cause be dismissed with costs.

KENDALL, HOWELL &
DEADRICH,

By /s/ WILLIAM H. HOWELL, JR.
Attorneys for Kaufman-Brown Potato Company,
a co-partnership composed of Charles H. Kauf-
man and Albert H. Brown. [42]

United States of America,
Southern District of California,
County of Kern—ss.

William A. Howell, Jr., being first duly sworn deposes and says that he is one of the attorneys

for Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, that said co-partners are both absent from the Southern District of California, and for that reason affiant makes this verification on behalf of said partners; that affiant has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge except as to those matters alleged upon information and belief and as to them he believes them to be true.

/s/ WILLIAM A. HOWELL, JR.

Subscribed and sworn to before me this 13th day of December, 1946.

[Seal] /s/ EVELYN BLAIR,
Notary Public in and for the County of Kern, State
of California.

Filed Dec. 16, 1946.

/s/ WALDO R. BERGMAN.

Receipt of copy acknowledged. [43]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated that the hearing on the orders to show cause against Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert Brown, be continued until Ten o'clock A.M. on October 4, 1947.

It Is Further Stipulated that William A. McGugin act as Special Master instead and in place of Waldo R. Bergman, and that all testimony heretofore given before Waldo R. Bergman as Special Master and as Referee which has been transcribed by a court reporter shall be read by William A. McGugin as Referee and Special Master and be considered by him the same as if said testimony was given before him.

Dated: September 10, 1947.

/s/ C. W. JOHNSTON,
Attorney for Trustee.
KENDALL, HOWELL &
DEADRICH,

By /s/ DONALD KENDALL,
Attorneys for Kaufman-
Brown Potato Company.

[Title of District Court and Cause.]

REFEREE'S MEMORANDUM OF OPINION

Gerry Horton Farms although referred to as a joint venture in the order is actually a co-partnership.

Section 2400 of California Civil Code provides "A partnership is an association of two or more persons to carry on as co-owners a business for profit."

Kaufman-Brown Potato Company became owners of a one-half interest in all potatoes planted during 1944 by virtue of paragraph one of the agreements in each case. (See Section 1735 C.C.C.) Is this ownership consistent with the creditor-debtor legal relationship or the relationship of partners? There seems to be only one answer to this.

Subdivision 4 of Section 2401 of the California Civil Code provides that an agreement or receipt of a share of the profits of a business is *prima facie* evidence that a person is a partner.

The agreements in the instant case not only provided for sharing the profits (paragraph 4 of agreements) but also a [45] sharing of the costs of operations and a sharing of the losses. (paragraph 7 of agreements).

The question is of course "what legal relationship was created between the parties by said agreements and conduct of the parties?" The petitioners contend it was one of creditor-debtor—can it be conceived that a lender would agree to pay one-half of

costs and losses suffered? The only reasonable interpretation of these provisions is that a partnership was created with its usual attributes.

A partnership may be formed for a single venture.

Gray vs. The Janss Investment Co.

186 Cal. 634

Stenian vs. Tashjian

178 Cal. 623

20 Cal. Jur. Page 687

The Court in a case involving an agreement very similar to the ones under consideration here held that a partnership had been created in Associated Piping Co. vs. Jones, 17 Cal. App. (2d) 107. There the court also states that the contract controls not the extraneous intent of the parties.

The Court there further states that the contract can give all control and management to one partner. The Court states at page 111 "If that contract, and if those dealings, so far as the world is concerned, measure up to the partnership relation, with the joint duties and liabilities attaching thereto, then, so far as third parties are concerned who have had dealings with them, they are partners."

Kaufman-Brown Potato Company secured, by these agreements, all the powers, privileges and advantages of partners. [46] Therefore they must assume the duties and liabilities of partners.

It is to be noted that the crop mortgage provided for in said agreements covered only First Parties'

one-half interest in said crops and were executed by the First Parties solely as security for the performance and conditions therein contained and for no other purpose, and that First Parties were not to be held liable to Kaufman-Brown Potato Company for loss occasioned by inclement weather, acts of God, losses resulting from acts of war or loss resulting from causes which are beyond the control of First Parties.

In other words, Kaufman-Brown Potato Co. did not receive an absolute promise to be repaid in any event but if the crops were destroyed by weather, floods, drought, war, etc. they were not to be repaid. Is this an incident of creditor-debtor relationship? It was quite possible petitioners would not be entitled to receive a cent in repayment or otherwise under the terms of the contract.

Furthermore, by virtue of paragraph 4 of said agreements both parties were to be reimbursed for all costs and expenses before any distribution of profit was to be made. So that if the relationship were one of creditor-debtor and the 50% profit provided for Kaufman-Brown Potato Co. was construed to be interest on the money advanced they would receive no interest until the debtor had been repaid his expenses also. This provision is very unusual and unreasonable for creditor-debtor relationship but a usual and ordinary incident of a partnership relation.

It is obvious that even though I denominated the relationship one of joint venture in my findings and

conclusions that a partnership was actually formed and carried out.

The petitioners consented to the adjudication when they [47] filed the involuntary petition against the partnership. Since Kaufman-Brown Potato Co. filed the involuntary petition against the partnership of which it was a partner it thereby waived any right to object to adjudication.

The Court in the matter of *In re Filmar*, 177 Fed. 170 held that the joining by the non-bankrupt partner with a firm creditor in a petition asking that the former firm assets be applied first on firm debts was consent to adjudication of the partnership.

See the cases of *Sturn vs. Ulrich*, 10 Fed. (2d) 9; and *The Matter of Shields and Mattison*, 14 Fed. (2d) 641.

Respectfully submitted,

/s/ WILLIAM A. McGUGIN,

Referee in Bankruptcy. [48]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The petition for order amending, modifying, and changing order of adjudication as to Gerry Horton Farms, a co-partnership, was regularly referred to Waldo R. Bergman, as Referee in Bankruptcy, and as special master for all purposes and to hear and determine the matters set forth in the trustee's

petition and to make findings, conclusions of law, and order thereon. Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, filed answer to the petition of the trustee, and the matter being at issue the same was set for definite hearing by Waldo R. Bergman, and the matter was continued from time to time at the request of Kaufman-Brown Potato Company, and thereafter testimony was introduced on behalf of Kaufman-Brown Potato Company on May 12 and 13, 1947, and the matter was regularly continued from time to time so that Gerry Horton, one of the bankrupts, could be present to testify, and the undersigned William A. McGugin was appointed as Referee in the place and stead of Waldo R. Bergman, and a stipulation was filed by the respective parties that the undersigned referee could act in the place and stead of Waldo R. Bergman and that all testimony heretofore given before [49] Waldo R. Bergman, as special master and as referee, which had been transcribed by a court reporter, should be read by William A. McGugin as referee and special master and be considered by him the same as if the testimony was given before him, and testimony was produced by the trustee and Kaufman-Brown Potato Company, a co-partnership, on the 8th day of December, 1947, and counsel for both sides were orally heard and later presented written briefs to support their respective positions, and the referee having been fully advised in the premises, does hereby make his finding of facts, to wit:

Findings of Fact

1. That Wayne Long is the duly appointed, qualified and acting trustee of the estates of the above bankrupts.

2. That on the 5th day of August, 1944, an involuntary petition in bankruptcy was filed at the hour of 10:10 o'clock A.M. by Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, and two other persons against the above mentioned bankrupts, and that a true copy of said involuntary petition was attached to the petition of the trustee and marked Exhibit "A", and that an order of general reference was made by the Honorable Paul J. McCormick, one of the judges of the above entitled court, which was filed in the above entitled court on the 5th day of August, 1944, at 11:30 o'clock A.M. a true copy of which was attached to the trustee's petition and marked Exhibit "B", and that on August 9, 1944, Waldo R. Bergman, referee in bankruptcy, to whom the above matter was referred by the judge, made an order authorizing Maurice E. Tice, Constable of the Sixth Township, County of Kern, State of California, to serve subpoenas on the alleged bankrupts. That between the 8th day of August, 1944, and the 10th day of August, 1944, service was made upon J. D. Althouse and Gerry Horton individually, and upon said parties as Gerry Horton Farms, a co-partnership, and thereafter the referee, on the 15th day of

August, 1944, made an order of adjudication of bankruptcy and order for filing of schedules in bankruptcy, a true copy of which order was attached to trustee's petition and marked Exhibit "C", and which order adjudicated Gerry Horton Company, a co-partnership composed of Gerry Horton and J. D. Althouse, Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, and Gerry Horton, an individual, and J. D. Althouse, an individual, as bankrupts. [50]

3. That at the time the involuntary petition in bankruptcy was signed by Kaufman-Brown Potato Company the said Kaufman-Brown Potato Company, and each of its partners, composed of said persons heretofore mentioned, knew that said Kaufman-Brown Potato Company was a joint venture or partners with Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, in the raising of potatoes, under the name of Gerry Horton Farms, a joint venture, and knew that there was also a partnership composed of Gerry Horton and J. D. Althouse doing business under the name of Gerry Horton Farms not engaged in the raising of potatoes and not operating during the time potatoes were raised and in which said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown were not interested, and knew that said Kaufman-Brown Potato Company was a creditor of said joint venture in the sum of \$22,594.82 and was not a creditor against

the Gerry Horton Farms, a partnership composed of only Gerry Horton and J. D. Althouse; and the said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown each falsely represented, knowing same was false, to the Court and creditors by the filing of said bankruptcy petition that Gerry Horton and J. D. Althouse were the only partners in the joint venture of raising potatoes, and that the party raising potatoes under the name of Gerry Horton Farms was the partnership composed of only Gerry Horton and J. D. Althouse; and the said Kaufman-Brown Potato Company, Charles H. Kaufman, and Albert H. Brown requested and consented that the Court adjudicate Gerry Horton Farms, the party who was raising potatoes and who was indebted to Kaufman-Brown Potato Company, a bankrupt.

4. That the attorney for said petitioning creditors was Donald Kendall and that at a meeting of creditors held on the 16th day of September, 1944, the said Donald Kendall, representing said Kaufman-Brown Potato Company and other creditors, secured the election and/or appointment of Wayne Long as trustee, and thereafter said Donald Kendall and Dominic Bianco, at the request of said trustee, were appointed as attorneys for said trustee and acted as attorneys for said trustee until they resigned on or about the first part of December, 1945; and during said period of time said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown never advised the Court that there

were two separate partnerships and that Kaufman-Brown Potato Company was a partner of Gerry Horton Farms, a joint [51] venture; and said Kaufman-Brown Potato Company consented and requested the Court to administer the estate of Gerry Horton Farms, a co-partnership, who was raising potatoes and who was indebted to Kaufman-Brown Potato Company.

5. That the Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, has its principal place of business at 64 South Watermarket, Chicago, Illinois, and during the year 1944 was doing business in the State of California and had its office and California place of business at 201 Sill Building, Bakersfield, County of Kern, State of California, being the same office as used by all of the above bankrupts.

6. That on or about the 22nd day of January, 1944, the said Gerry Horton and J. D. Althouse, as co-partners doing business under the firm name and style of Gerry Horton Farms, and Charles H. Kaufman and Albert H. Brown doing business under the firm name and style of Kaufman-Brown Potato Company, entered into a joint venture agreement, a true copy of which agreement was attached to the petition of the trustee and marked Exhibit "D", and that said persons agreed to the raising of potatoes upon certain terms and conditions upon certain real property known as "Arvin property"

located in the County of Kern, State of California, and particularly described as follows:

Northwest quarter (NW $\frac{1}{4}$) of Section Twenty-seven (27), Township Thirty-two (32) South, Range Twenty-nine (29) East, M. D. B. & M., and containing one hundred sixty acres (160) more or less, and on or about the 16th day of November, 1943, the same persons entered into a joint venture agreement, a true copy of which agreement is attached to trustee's petition and marked Exhibit "E", and that said persons agreed to raising of potatoes upon certain terms and conditions upon certain real property known as "Shafter property" located in the County of Kern, State of California, and particularly described as follows:

All of the fractional Southwest quarter (SW $\frac{1}{4}$) of Section Eighteen (18), Township Twenty-eight (28) South, Range Twenty-six (26) East, M. D. B. & M., and containing one hundred eighty-six (186) acres, more or less.

That it was the actual intention of Kaufman-Brown Potato Company, a co-partnership, and its partners as heretofore mentioned, and Gerry Horton Farms, a co-partnership, and its partners as heretofore mentioned, to form a partnership or [52] joint venture for the raising of potatoes on the real properties above described and each of the parties had the right and could make contracts and incur liabilities on behalf of said joint venture and manage and control the business, and jointly carry on the business of said joint venture; and said parties

did jointly participate in the management and control of the business of said joint venture and that pursuant to the terms of said agreements the said Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a co-partnership composed of J. D. Althouse and Gerry Horton, commenced business on November 16, 1943 of the said joint venture under the name of Gerry Horton Farms and continued said joint venture until August 5, 1944; that Gerry Horton and J. D. Althouse did sell, convey and transfer to said Kaufman-Brown Potato Company a fifty per cent (50%) interest in the potato crop on the Arvin property and a forty per cent (40%) interest in the potato crop on the Shafter property; that each partnership became a co-owner in said potatoes to be raised for profit by said joint venture; that each partner was to pay fifty per cent (50%) of the joint ventures cost of harvesting the potatoes on the Arvin property and said Kaufman-Brown Potato Company was to pay forty per cent (40%) of said cost on the Shafter property; that the net profits or losses were to be divided between the said partners on the Arvin property and the said Kaufman-Brown Potato Company was to receive forty per cent (40%) of the profit or bear forty per cent (40%) of the losses on the Shafter property, and that during the period heretofore mentioned there was planted, raised and harvested by said joint venture, crops of potatoes, and that said joint venture, com-

posed of said partnership heretofore mentioned, doing business under the name of Gerry Horton Farms in the raising of potatoes during the period heretofore mentioned on the above described properties, did purchase goods, wares, merchandise, electricity and water and did borrow money from the hereinafter mentioned persons in the amounts set forth after their names, all of which was used for the raising of potatoes on said properties by said joint venture for the benefit of said joint venture as follows, to wit:

Rexroth & Rexroth	\$ 282.54
General Petroleum Corporation	36.06
A. H. Karpe	169.83
Stroud-Seabrook	106.58
Bakersfield Hardware Co.	50.32
Wasco Hardware Co.	68.46
Kern County Bank	2,154.35
Rosedale Warehouse Co.	880.99
Pacific Gas & Electric Co.	2,847.61
King Lumber Co.	364.16
Central Canal Co.	583.40
<hr/>	
Total	\$7,544.30

That all of said amounts are owing to said creditors and have not been paid.

7. That the trustee of Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, has in his possession cash in the sum of \$1,471.77 being money obtained from the sale of personal property, of \$271.50 for potatoes, \$338.64

for sacks, \$199.13 for pipes, \$85.00 for potato roller, \$325.00 for Killefen carrier and ditcher, \$125.00 for twine, \$40.00 for 200 gallon gas tank, \$150.00 for 1000 gallon gas tank and pump, and \$17.50 for five grease guns, which belongs to Gerry Horton Farms, a joint venture composed of Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, and Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, and that there are no other assets belonging to said joint venture and that of said sum above mentioned \$383.22 has been expended in administration costs. That Gerry Horton individually has no assets other than those exempt, and J. D. Althouse individually has no assets other than those exempt; that Gerry Horton Company, a co-partnership composed of Gerry Horton and J. D. Althouse, has cash on hand in the sum of \$1,908.77 and no other assets, and claims filed and approved in the sum of over \$38,-092.31, and that Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, has cash on hand in the sum of \$10,742.43 and no other assets, and claims filed and approved in the sum of over \$48,530.14; that no fees have been paid to the attorney for the trustee and the former attorneys for the trustee, nor has the trustee been paid in full, nor have referee's fees, expenses and commissions been paid in full.

8. That none of the allegations of Kaufman-Brown Potato Company's answer are true except those allegations herein found to be true.

From the foregoing findings of fact, the referee makes his conclusions of law as follows, to wit: [54]

Conclusions of Law

1. That by reason of the partnership agreements heretofore mentioned and by the conduct of Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, and each of them, the said co-partnership of Kaufman-Brown Potato Company and Charles H. Kaufman and Albert H. Brown each became individually and severally liable for the payment of the debts and obligations mentioned and described in paragraph 7 of the findings, and trustee fees, attorney fees for trustee's attorney, and all other bankrupt expense in connection with Gerry Horton Farms, a joint venture.

2. That Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, is a general partner of the joint venture of Gerry Horton Farms, a joint venture composed of Kaufman-Brown Potato Company, a co-partnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a co-partnership consisting of Gerry Horton and J. D. Althouse.

3. That Charles H. Kaufman, Albert H. Brown and Kaufman-Brown Potato Company, a co-partnership composed of said parties, both by reason of their acts and their conduct and in particular by surrendering of the assets of Gerry Horton Farms, a joint venture, to the trustee for the ad-

ministration thereof, and the filing of certain proof of debt claimed against said joint venture are now estopped from denying that they did not consent to the adjudication in bankruptcy against said joint venture, and by the filing of the involuntary petition in bankruptcy consented to adjudication in bankruptcy of said joint venture and to the administration of the joint venture property and the assets in bankruptcy proceedings; and accordingly the court herein having acquired jurisdiction of Gerry Horton Farms, the joint venture composed of said Kaufman-Brown Potato Company, a co-partnership, and Gerry Horton Farms, a co-partnership, has, by virtue of the provisions of the Bankruptcy Act, jurisdiction of the administration of said joint venture; and that the order of adjudication should be corrected, amended and modified by adding thereto, in addition to those adjudged bankrupts, "Gerry Horton Farms, a joint venture composed of Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse." [55]

4. That Wayne Long be appointed and/or continue as trustee of said joint venture, without any additional bond.

Dated: May 22nd, 1948.

/s/ WILLIAM A. McGUGIN,

Referee.

[Endorsed]: Filed May 22, 1948. [56]

[Title of District Court and Cause.]

ORDER

By reason of the law and findings of fact and conclusions of law on file herein;

It Is Ordered, Adjudged and Decreed:

1. That the order of adjudication of bankruptcy dated August 15, 1944 signed by Waldo R. Bergman, Referee in Bankruptcy, be and it is hereby amended and modified by changing the first paragraph of said order to read as follows:

“At Bakersfield, in the Southern District of California, on the 15th day of August, 1944, before Honorable Waldo R. Bergman, Referee in Bankruptcy, the petition of Kaufman-Brown Potato Company, a copartnership, Earl Cecil and J. Deacy Brown doing business as Rosedale Warehouse Company, a copartnership, and John Lewis praying that Gerry Horton Company and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, and Gerry Horton and J. D. Althouse, individually, be adjudicated bankrupts within the true intent and meaning of the Act of Congress relating [57] to bankruptcy, having been heard and duly considered; and it appearing that Gerry Horton Company is a partnership composed of J. D. Althouse and Gerry Horton; that Gerry Horton Farms, a copartnership, is composed of Gerry Horton and J. D. Althouse; that Gerry Horton

Farms, a joint venture, is composed of Kaufman-Brown Potato Company, a copartnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse; and that said partnerships of Gerry Horton Company, Gerry Horton Farms, and Gerry Horton Farms, a joint venture, and Gerry Horton, an individual, and J. D. Althouse, an individual, are all involent and that Kaufman-Brown Potato Company, a copartnership, one of the general partners of Gerry Horton Farms, a joint venture, consented to the adjudication in bankruptcy and administration of the estate of Gerry Horton Farms, a joint venture.”

2. That Gerry Horton Company, a co-partnership composed of Gerry Horton and J. D. Althouse; Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse; Gerry Horton Farms, a joint venture composed of Kaufman-Brown Potato Company, a copartnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership consisting of Gerry Horton and J. D. Althouse; Gerry Horton, an individual; and J. D. Althouse, an individual, is each a bankrupt under the Act of Congress relating to bankruptcy and each is hereby declared and adjudged a bankrupt accordingly.

3. That Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, a general partner of the joint

venture of Gerry Horton Farms, a joint venture, is individually liable and severally liable with the two partners of Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown, for the payment of the debts and obligations of Gerry Horton Farms, a joint adventure, together with trustee's fees, attorney's fees for the attorney for the trustee, and referee's fees, expenses and commissions, and all other bankruptcy court expense; and the creditors of said Gerry Horton Farms, a joint venture, to which said partnership of Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown are liable as above mentioned are as follows, [58] according to the amounts set forth after each creditor's name, to wit:

Rexroth & Rexroth.....	\$ 282.54
General Petroleum Corporation.....	36.06
A. H. Karpe.....	169.83
Bakersfield Hardware Co.....	50.32
Stroud - Seabrook.....	106.58
Wasco Hardware Co.....	68.46
Kern County Bank.....	2,154.35
Rosedale Warehouse Co.....	880.99
Pacific Gas & Electric Co.....	2,847.61
King Lumber Co.....	364.16
Central Canal Co.....	583.40
<hr/>	
Total	\$7,544.30

4. That Wayne Long continue as trustee of said joint venture of Gerry Horton Farms without any additional or other bond than the bonds heretofore given and that he transfer from the bank account of

Gerry Horton Farms, a copartnership, the sum of \$1,087.95 to Gerry Horton Farms, a joint venture.

Dated: May 22nd, 1948.

/s/ WILLIAM A. McGUGIN,

Referee in Bankruptcy.

[Endorsed]: Filed May 22, 1948.

[Title of District Court and Cause.]

PETITION FOR REVIEW

The petition of Kaufman-Brown Potato Company, a partnership composed of Charles H. Kaufman and Albert H. Brown, and the said Charles H. Kaufman and Albert H. Brown, individually, respectfully shows:

I.

On May 22, 1948, William A. McGugin, a Referee in Bankruptcy of the above entitled court, signed, filed and entered in the above entitled proceeding his findings of fact, conclusions of law and order amending and modifying the order of adjudication in this involuntary bankruptcy proceeding, entered August 15, 1944, to the effect that Gerry Horton Farms, a joint venture composed of Kaufman-Brown Potato Company, a partnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a partnership composed of

Gerry Horton and J. D. Althouse, is also adjudged a bankrupt; and that the said Kaufman-Brown Potato Company, a partnership, and its two partners, are individually and severally liable for the payment of the debts of the said joint venture and for the payment of the expenses of administration of the estate thereof herein.

II.

The said order is erroneous for the following reasons:

1. The said order and the findings of fact and conclusions of law upon which it is based are premised upon the theory that joint ventures are subject to bankruptcy, whereas in the National Bankruptcy Act of 1898, as amended, no provision is made for the bankruptcy of joint ventures, at least for a single transaction such as the one here, either as voluntary bankrupts or as involuntary bankrupts.

2. The said order and the findings of fact and conclusions of law upon which it is based are premised upon the assumption that the above named bankrupts and the said creditor engaged in a joint venture for the growing, harvesting and sale of a potato crop, whereas the evidence in this case discloses that no such joint venture existed, in that:

- a. The written contracts between the parties, dated November 16, 1943 and January 22, 1944, by their terms, negative any time to create a joint venture, because they did not contemplate or provide

for any community of interest between the parties with respect to the right to make contracts, incur liabilities, participate in the management of the business, and the like.

b. There was not any joint management or control of the business of growing, harvesting and selling the said crop. Such management and control rested solely with the above named bankrupts. (Rep. Tr., Dec. 8, 1947, p. 83). Nor did the said creditor have anything to do with the buying of supplies or materials, or the hiring or firing of help, and all such matters were handled exclusively by the said bankrupts (Rep. Tr., Dec. 8, 1947, p. 82). [61]

c. The conduct of the parties under the contract negatives a joint venture, in that: (1) the complete control, management and operation of the transaction was solely in the hands of, and solely carried out by the above named bankrupts; and neither the said creditor, nor either of the partners thereof has any part in the operation of such business (Rep. Tr., Dec. 8, 1947, p. 83; May 12-13, 1947, p. 24, 25); (2) the leases to Gerry Horton Farms, where the potatoes were grown, and the equipment used in the transaction belonged solely to the above named bankrupt at all times, and no interest therein was ever transferred to any joint venture or to said creditor (Rep. Tr., Dec. 8, 1947, p. 41, 81); (3) the above named bankrupts were engaged generally in the business of buying, selling and speculating in

potatoes (Rep. Tr., Dec. 8, 1947, p. 54, 63); (4) the money advanced by the said creditor was not deposited to the credit of any joint venture, or to the credit of the above named bankrupts and the said creditor, but solely to the credit of the above named bankrupts, the checks drawn upon the said account were by the above named bankrupts only, and the said creditor did not have any right to draw upon said account for anything (Rep. Tr., Dec. 8, 1947, p. 84); (5) the above named bankrupts sent the said creditor their checks in reduction of the advances made by said creditor to the bankrupts, and on said checks the bankrupts wrote the words "on loan," which checks were subsequently dishonored (Rep. Tr., p. 73, 74 and 75); (6) a crop mortgage was given by the above named bankrupts to the said creditor to secure the repayment of advances made by the said creditor to the said bankrupts in connection with the said transaction (Rep. Tr., May 12-13, 1947, p. 15-19); (7) there were not any business transactions between the above named bankrupts and the said creditor, other than the single transaction here in question, with respect to the potato deal (Rep. Tr., May 12, 13, 1947, p. 24); (8) the above named bankrupts shipped to the said creditor at Chicago a portion of the harvested crop, the said creditor paid the said bankrupts for such shipment, and the money so received by the said bankrupts was deposited to their own account and not to the credit of any joint venture (Rep. Tr., Dec. 8, 1947, p. 83);

(9) all liabilities in connection with the growing, harvesting and selling of the potato crop were incurred by the above named bankrupts; and (10) the said creditor did not make any contracts, incur any liabilities, or participate in the management of the transaction.

3. In view of the foregoing, findings of fact Nos. 3, 6 and 8 are unsupported by the evidence and clearly erroneous in so far as they declare that any joint venture existed between the parties and that petitioners herein are in any way liable by reason of any joint venture, and the conclusions of law based thereon likewise.

4. Even if a joint venture did exist between the parties, such joint venture was not included in the original adjudication, nor was any adjudication asked for any joint venture; and the said Kaufman-Brown Potato Company has not had its day in court, or been given an opportunity to defend against any involuntary petition seeking to have any such joint venture adjudicated a bankrupt and to defeat any such petition by showing that it, even if a party to any such joint venture, is solvent, and that, therefore, any such joint venture cannot be adjudicated a bankrupt in the face of such opposition. The evidence discloses that said Kaufman-Brown Potato Company is and was solvent (Rep. Tr., May 12-13, 1947, p. 36 and 37).

Wherefore, petitioners pray that the said order of the referee be reversed; and for general relief.

Dated: June 1, 1948.

KAUFMAN-BROWN POTATO
COMPANY,
a partnership, and CHARLES H. KAUFMAN
and ALBERT H. BROWN, individually,
SAMUEL C. COLBY and
GRAINGER & HUNT.
By /s/ REUBEN G. HUNT,
Its attorneys.

State of California,
County of Los Angeles—ss.

Samuel C. Colby, being first duly sworn, deposes and says: I am one of the attorneys for the within named petitioners and make this verification for and on their behalf, for the reasons that neither of the partners of the petitioner is within the County of Los Angeles, where I and my associates, Grainger and Hunt, have our offices, and the matters stated in the said petition are within my knowledge.

I have read the said petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

/s/ SAMUEL C. COLBY,

Subscribed and sworn to before me this 4th day of June, 1948.

[Seal]: /s/ RHAE LICHT,
Notary Public, Los Angeles County, California.

Affidavit of service by mail attached.

[Endorsed]: Filed June 5, 1948.

[Title of District Court and Cause.]

CERTIFICATE BY REFEREE TO JUDGE ON
ORDER MODIFYING ADJUDICATION TO
INCLUDE KAUFMAN-BROWN POTATO
COMPANY AS ONE OF THE GENERAL
PARTNERS OF GERRY HORTON FARMS

I, William A. McGugin, is one of the Referees of said court, do hereby certify that in the course of proceedings in said cause before me there was referred to me by Paul J. McCormick as Referee and as Special Master the petition of Wayne Long, Trustee of Gerry Horton Farms, a copartnership, for an order amending modifying and changing the order of adjudication to include Kaufman Brown Potato Company as one of the general partners of said copartnership, and answer was filed by said Kaufman-Brown Potato Company and thereafter hearings were had at the times specified in the findings of fact and the following questions were presented:

1. Was Kaufman-Brown Potato Company a general partner of Gerry Horton Farms in the raising of potatoes in Kern County during the period from November 16, 1943 to July 8, 1944?

2. Did Kaufman-Brown Potato Company (with two other persons) in filing an involuntary petition in bankruptcy against said Gerry Horton Farms, of which it [66] was a partner, consent to the adjudication of said partnership of which it was a member?

My answer to both of the above questions was “yes” and I made appropriate findings, which are among the exhibits attached to this certificate.

Facts

The undisputed facts are that Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, entered into two agreements with Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, relative to the raising of potatoes in Kern County, and that copies of the originals of said agreements are attached to trustee's petition which is attached to this certificate. The two contracts are identical except as to amounts and except that on one contract Kaufman-Brown was to receive 40% of the profits or losses and on the other contract Kaufman-Brown was to receive 50% of the profits or losses. The agreements provide as follows:

1. Kaufman-Brown Potato Company purchased a 50% interest in the potato crop to be planted, raised and harvested upon the property and Kaufman-Brown was to pay a consideration for the interest. (paragraphs 1 and 7, 1st page)

2. Kaufman-Brown was to pay 50% of the harvesting cost of the potatoes. (paragraph 3, page 2).

3. The net proceeds or profits obtained from the sale of the potato crop were to be divided between the Partners on a basis of 50% to each. The contract here specifically mentioned the partners. In other places in the contract where it mentions Kauf-

man-Brown is to do something it refers to Kaufman-Brown as second parties, and where Althouse and Horton are to do certain things it refers to them as first parties. (Paragraph 4, page 2). First party was to keep proper books of all expenditures and the books and accounts and all other records were to be open to inspection and access of the second parties (paragraph 5, page 2).

4. Kaufman-Brown was to pay one-half of the losses. (paragraph 7, page 3).

5. Kaufman-Brown had a right to purchase the potatoes and if there was no prevailing market for the sale of potatoes, then Kaufman-Brown was to handle the potatoes through the Terminal Market at Chicago as Agent and they were to be [67] paid a charge of 10c per sack as commission for their services rendered to the partners. Here again the contract refers to as partners when dealing with all of the parties and the contract further provides for equal division on mark ups. (paragraph 8, page 3).

6. Kaufman-Brown had facilities for disposing of potatoes in Chicago and Gerry Horton and J. D. Althouse had equipment and land leased to raise potatoes and Gerry Horton and J. D. Althouse were to devote their best efforts to the raising of the potatoes and to furnish equipment, which they did. (paragraph 9, Page 4).

7. Kaufman-Brown had Gerry Horton and J. D. Althouse execute a promissory note secured by chattel mortgage for advancement and the contract

provides "that said advancement is solely for the security of the performance and conditions herein contained and for no other purpose and Gerry Horton and J. D. Althouse are not to be held liable to Kaufman-Brown for losses occasioned by weather," etc. (Paragraphs 11 and 12, page 4).

Kaufman-Brown maintained their California office in the same room as the office maintained by Gerry Horton and J. D. Althouse. Both Mr. Kaufman and Mr. Brown came to California and at various times inspected the farming operations and its progress and they made certain recommendations as to when the potatoes should be dug. (Page 82, lines 9 to 13 of Gerry Horton's testimony).

Attorney Donald Kendall, representing Kaufman-Brown, secured the election of trustee on September 16, 1944 and acted as attorney for Kaufman-Brown and the trustee during said period until he resigned on the 1st of December, 1945; and during said period of time said Kaufman-Brown did not advise the court that there were two partnerships under the name of Gerry Horton Farms, one of which was not operating and in which Kaufman-Brown Potato Company had no interest, and the other of which was operating and raising potatoes and in which Kaufman-Brown had an interest; and at the hearing before the court on March 21, 1947, the said Donald Kendall, still representing Kaufman-Brown, stipulated that Kaufman-Brown were general partners of Gerry Horton Farms, as follows:

“Mr. Kendall: Your position is, Mr. Johnston, that they are partners only in so far as this crop deal is concerned. [68]

Mr. Johnston: As far as these contracts, they were in partnership on that.

Mr. Kendall: On the general farming crop, no; they were general farming partners as far as potatoes were concerned, yes. I do not think they were liable for the planting of the tomatoes, or for any brokerage transactions that the other company had.”

The petition for review of Kaufman-Brown Potato Company is not true and is incorrect in the following respects, to wit:

1. That I did not find that Gerry Horton Farms, the partnership of which Kaufman-Brown was a partner, was a joint venture and not a partnership, but I found the same was a partnership; but in my findings I designated it in certain places as a joint venture so that the findings would not be confused with the Gerry Horton Farms where Kaufman-Brown was not a partner and which was not then being operated, and my findings were based upon the admitted facts as above stated and other facts as shown by transcripts of testimony, including the testimony by Mr. Kaufman, one of the partners of Kaufman-Brown, in which he testified, on Page 18, Line 15, after reciting that Mr. Brown himself and Gerry Horton had had a conversation as to what was to be done, that in any event, whatever his conversation was it was terminated in the execution of

the written contracts; and the testimony of Gerry Horton, at line 23, page 88, of his testimony, that he furnished the facts regarding the conversations he had with Mr. Brown and Mr. Kaufman to Attorney Chain, who then prepared the contracts according to the facts so related and they were forwarded to Mr. Brown and Mr. Kaufman for their signatures.

2. That I did not also adjudicate the partnership of Gerry Horton Farms, of which Kaufman-Brown Potato Company was a partner, a bankrupt as recited in said petition for review as said partnership was already adjudicated a bankrupt at the request of Kaufman-Brown, but said order modified and corrected said adjudication to include Kaufman-Brown Potato Company as one of the partners.

3. The control, management and operations were carried on by both partners instead of just one partner. The contract allots certain things to be done by one partner and the other things to be done by the other partner. Kaufman-Brown was to handle the sale of the potatoes in Chicago and account to the partnership. [69] Gerry Horton and J. D. Althouse were to furnish equipment and to raise the potatoes and a half interest in the crop being raised was assigned to Kaufman-Brown and Kaufman-Brown was to pay one-half of the losses. Gerry Horton Farms was not engaged in buying, selling and speculating in potatoes as set forth in Lines 11 to 13 of the petition. That was Gerry

Horton Company, which is a separate partnership and has nothing to do with the controversy in question. The money advanced by Kaufman-Brown was not used in any other venture except the potato partnership and it was placed in a different bank in a third checking account (Page 87 Horton's testimony, lines 9 to 17).

The findings of fact and conclusions of law which were prepared by the attorney for the trustee were served upon the bankrupt's attorney and after ten days after service I received letters from the attorneys representing Kaufman-Brown, requesting certain corrections and revisions and thereafter I set aside said findings of fact and ordered prepared new findings of fact and the same were signed by me on the 22nd day of May, 1948 and I entered and signed order based upon said findings of fact and conclusions of law on the 22nd day of May, 1948, and notice of said signing of findings of fact and conclusions of law and said order amending adjudication was served upon the attorneys for Kaufman-Brown on the 25th day of May, 1948. Thereafter, on the 5th day of June, 1948, the said Kaufman-Brown filed its petition for review of said order by the Judge.

Attached to this Certificate are the following documents:

1. Petition for review.
2. Petition of said trustee for order amending, modifying and changing order of adjudication.

3. The answer of Kaufman-Brown to said petition.

4. Transcript of hearing of March 21, 1947.

5. Transcript of evidence of Charles H. Kaufman, together with exhibits mentioned therein.

6. Transcript of evidence of Gerry Horton.

7. Findings of fact and conclusions of law.

8. Order amending Adjudication.

9. Proof of Service of said Findings of Fact and Conclusions of Law and Order.

10. Involuntary petition filed in bankruptcy on the 5th day of August, 1944, signed by Kaufman-Brown Potato Company among others—by reference to original in clerk's office. (copy attached to Item 2 handed up herewith).

11. Certified copy of Order of Adjudication of Gerry Horton Company, a copartnership, J. D. Althouse and Gerry Horton, individually; Gerry Horton Farms, a copartnership. (Attached to Item 2 handed up herewith.)

12. Certified copy of Order Approving Trustee's Bond.

13. Stipulation of counsel agreeing that William A. McGugin act as special master instead and in place of Waldo R. Bergman, and that all testimony previously taken be considered by him.

14. Certified copy of Order to Show Cause.

15. Certified copy of Order of General Reference. (Attached to Item 2 handed up herewith.)

16. Referee's Memorandum of Opinion.

17. This Certificate.

Respectfully submitted this 16th day of July, 1948.

/s/ WILLIAM A. McGUGIN,
Referee in Bankruptcy.

[Endorsed] Filed July 22, 1948.

At a stated term, to wit: The April Term. A. D. 1948, of the District Court of the United States of America, for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 25th day of July in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable: CAMPBELL
E. BEAUMONT,
District Judge.

[Title of Cause.]

The Court having heretofore taken under submission the petition of Kaufman-Brown Potato Co. for review of the Referee's order, now finds that there is sufficient evidence to support the Referee's findings, and by filing of the petition in involuntary bankruptcy, Kaufman-Brown Potato Co. consented to adjudication. The Court adopts and confirms the Referee's findings as amended, and his order as amended is affirmed. [72]

[Title of District Court and Cause.]

ORDER

The petition of Kaufman-Brown Potato Company for review of Referee's order determining that Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, came on regularly for hearing before Honorable C. E. Beaumont, a Judge of the above entitled Court, on the 29th day of October, 1948, Samuel C. Colby, and Ruben Hunt of the law firm of Grainger and Hunt appearing as attorneys for Kaufman-Brown Potato Company, and C. W. Johnston of the law firm of Johnston, Baker and Palmer, appearing as attorney for the trustee of said bankrupts, and the case having been argued by the attorneys for the respective parties, and the matter having been submitted, and it appearing to the Court from the Referee's Certificate that the Referee determined that Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, was a general partner of Gerry Horton Farms, but that in the findings of fact, conclusions of law, and order the Referee in some places designated Gerry Horton Farms as a joint venture so that it would not be confused with Gerry Horton Farms, a copartnership, which was not in the business of raising potatoes, and of which Kaufman-Brown Potato Company was not a partner, and the attorney for the trustee at the time of hearing, and in his brief filed requested that the findings of fact, conclusions of

law and order be modified by eliminating and striking out "joint venture," and by inserting in lieu thereof the word "partnership" or other appropriate words so that there would be no doubt or question that said Gerry Horton Farms of which Kaufman-Brown Potato Company was a member, was a partnership; and the court being fully advised finds that the Kaufman-Brown Potato Company, a partnership composed of Charles H. Kaufman and Albert H. Brown, was a general partner of Gerry Horton Farms, a partnership, and that by the filing of the petition in involuntary bankruptcy, Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, consented to adjudication of said Gerry Horton Farms, a copartnership, of which it was a member, and the court adopts and confirms the referees findings of fact, conclusions of law and order, excepting only that they are amended by eliminating the words "joint venture" and inserting in lieu thereof the word "partnership," and by adding additional words to show that it was a partnership so that the finding of fact and conclusions of law will read as amended by the court according to Exhibit "A" attached hereto, and the Judgement will read according to Exhibit "B" attached hereto.

It Is Therefore Adjudged, Ordered and Decreed that the findings of fact, conclusions of law and order of the referee determining that Kaufman-Brown Potato Company, composed of Charles H. Kaufman and Albert H. Brown, was a general partner of Gerry Horton Farms, the partnership en-

gaged in the raising of potatoes, is hereby confirmed, approved and adopted, as amended by this court according to Exhibit "A" and "B" attached hereto.

August 29, 1949.

/s/ C. E. BEAUMONT,

Judge.

EXHIBIT "A"

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The petition for order amending, modifying, and changing order of adjudication as to Gerry Horton Farms, a copartnership, was regularly referred to Waldo R. Bergman, as Referee in Bankruptcy, and as special master for all purposes and to hear and determine the matters set forth in the trustee's petition and to make findings, conclusions of law, and order thereon. Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, filed answer to the petition of the trustee, and the matter being at issue the same was set for definite hearing by Waldo R. Bergman, and the matter was continued from time to time at the request of Kaufman-Brown Potato Company, and thereafter testimony was introduced on behalf of Kaufman-Brown Potato Company on May 12 and 13, 1947, and the matter was regularly continued from time to time so that Gerry Horton, one of the bankrupts, could be present to testify,

and the undersigned William A. McGugin was appointed as Referee in the place and stead of Waldo R. Bergman, and a stipulation was filed by the respective parties that the undersigned referee could act in the place and stead of Waldo R. Bergman and that all testimony heretofore given [75] before Waldo R. Bergman, as special master and as referee, which had been transcribed by a court reporter, should be read by William A. McGugin as referee and special master and be considered by him the same as if the testimony was given before him, and testimony was produced by the trustee and Kaufman-Brown Potato Company, a copartnership, on the 8th day of December, 1947, and counsel for both sides were orally heard and later presented written briefs to support their respective positions, and the referee having been fully advised in the premises, does hereby make his finding of facts, to wit:

Findings of Facts

1. That Wayne Long is the duly appointed, qualified and acting trustee of the estates of the above bankrupts.

2. That on the 5th day of August, 1944, an involuntary petition in bankruptcy was filed at the hour of 10:10 o'clock A.M. by Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, and two other persons against the above mentioned bankrupts, and that a true copy of said involuntary petition was attached to the petition of the trustee and marked Exhibit "A," and that an order of

general reference was made by the Honorable Paul J. McCormick, one of the judges of the above entitled Court, which was filed in the above entitled court on the 5th day of August, 1944, at 11:30 o'clock A.M. a true copy of which was attached to the trustee's petition and marked Exhibit "B" and that on August 9, 1944, Waldo R. Bergman, referee in bankruptcy, to whom the above matter was referred by the judge, made an order authorizing Maurice E. Tice, Constable of the Sixth Township, County of Kern, State of California, to serve subpoenas on the alleged bankrupts. That between the 8th day of August, 1944, and the 10th day of August, 1944, service was made upon J. D. Althouse and Gerry Horton individually, and upon said parties as Gerry Horton Farms, a copartnership, and thereafter the referee, on the 15th day of August, 1944, made an order of adjudication of bankruptcy and order for filing of schedules in bankruptcy, a true copy of which order was attached to trustee's petition and marked Exhibit "C," and which order adjudicated Gerry Horton Company, a copartnership composed of Gerry Horton and J. D. Althouse, Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, and Gerry Horton, an individual, and J. D. Althouse, an [76] individual, as bankrupts.

3. That at the time the involuntary petition in bankruptcy was signed by Kaufman-Brown Potato Company the said Kaufman-Brown Potato Company, and each of its partners, composed of said

persons heretofore mentioned, knew that said Kaufman-Brown Potato Company was a partner with Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, in the raising of potatoes, under the name of Gerry Horton Farms, a partnership, and knew that there was also a partnership composed of Gerry Horton and J. D. Althouse doing business under the name of Gerry Horton Farms not engaged in the raising of potatoes and not operating during the time potatoes were raised and in which said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown were not interested, and knew that said Kaufman-Brown Potato Company was a creditor of said partnership in the sum of \$22,594.82 and was not a creditor against the Gerry Horton Farms, a partnership composed of only Gerry Horton and J. D. Althouse; and the said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown each falsely represented, knowing same was false, to the court and creditors by the filing of said bankruptcy petition that Gerry Horton and J. D. Althouse were the only partners in the partnership of raising potatoes, and that the party raising potatoes under the name of Gerry Horton Farms was the partnership composed of only Gerry Horton and J. D. Althouse; and the said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown requested and consented that the court adjudicate Gerry Horton Farms, the party who was raising potatoes and who was indebted to Kaufman-Brown Potato Company, a bankrupt.

4. That the attorney for said petitioning creditors was Donald Kendall and that at a meeting of creditors held on the 16th day of September, 1944, the said Donald Kendall, representing said Kaufman-Brown Potato Company and other creditors, secured the election and/or appointment of Wayne Long as trustee, and thereafter said Donald Kendall and Dominic Bianco, at the request of said trustee, were appointed as attorneys for said trustee and acted as attorneys for said trustee until they resigned on or about the first part of December 1945; and during said period of time said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown never advised the court that there were two separate [77] partnerships and that Kaufman-Brown Potato Company was a partner of Gerry Horton Farms, the partnership which was raising potatoes, and said Kaufman-Brown Potato Company consented and requested the court to administer the estate of Gerry Horton Farms, a copartnership, who was raising potatoes and who was indebted to Kaufman-Brown Potato Company.

5. That the Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, has its principal place of business at 64 South Watermarket, Chicago, Illinois, and during the year 1944 was doing business in the State of California and had its office and California place of business at 201 Sill Building, Bakersfield, County of Kern, State of California, being the same office as used by all of the above bankrupts.

6. That on or about the 22nd day of January 1944, the said Gerry Horton and J. D. Althouse, as copartners doing business under the firm name and style of Gerry Horton Farms, and Charles H. Kaufman and Albert H. Brown doing business under the firm name and style of Kaufman-Brown Potato Company, entered into a partnership agreement, a true copy of which agreement was attached to the petition of the trustee and marked Exhibit "D," and that said persons agreed to the raising of potatoes upon certain terms and conditions upon certain real property known as "Arvin property" located in the County of Kern, State of California, and particularly described as follows:

Northwest quarter (NW $\frac{1}{4}$) of Section Twenty-seven (27), Township Thirty-two (32) South, Range Twenty-nine (29) East, M. D. B. & M., and containing one hundred sixty acres (160), more or less,

and on or about the 16th day of November, 1943, the same persons entered into a partnership agreement, a true copy of which agreement is attached to trustee's petition and marked Exhibit "E," and that said persons agreed to raising of potatoes upon certain terms and conditions upon certain real property known as "Shafter property," located in the County of Kern, State of California, and particularly described as follows:

All of the fractional Southwest quarter (SW $\frac{1}{4}$) of Section Eighteen (18), Township Twenty-eight

(28) South, Range Twenty-six (26) East, M. D. B. & M., and containing one hundred eighty-six (186) acres, more or less.

That it was the actual intention of Kaufman-Brown Potato Company, a copartnership, and its partners as heretofore mentioned, and Gerry Horton Farms, [78] a copartnership, and its partners as heretofore mentioned, to form a partnership for the raising of potatoes on the real properties above described and each of the parties had the right and could make contracts and incur liabilities on behalf of said partnership and manage and control the business, and jointly carry on the business of said partnership; and said parties did jointly participate in the management and control of the business of said partnership and that pursuant to the terms of said agreements the said Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed of J. D. Althouse and Gerry Horton, commenced business on November 16, 1943, of the said partnership under the name of Gerry Horton Farms and continued said partnership until August 5, 1944; that Gerry Horton and J. D. Althouse did sell, convey and transfer to said Kaufman-Brown Potato Company a fifty per cent (50%) interest in the potato crop on the Arvin property and a forty per cent (40%) interest in the potato crop on the Shafter property; that each partnership

became a co-owner in said potatoes to be raised for profit by said partnership; that each partner was to pay fifty per cent (50%) of the partnership cost of harvesting the potatoes on the Arvin property and said Kaufman-Brown Potato Company was to pay forty per cent (40%) of said cost on the Shafter property; that the net profits or losses were to be divided between the said partners on the Arvin property and the said Kaufman-Brown Potato Company was to receive forty per cent (40%) of the profit or bear forty per cent (40%) of the losses on the Shafter property, and that during the period heretofore mentioned there was planted, raised and harvested by said partnership, crops of potatoes, and that said partnership, composed of said partnership heretofore mentioned, doing business under the name of Gerry Horton Farms, in the raising of potatoes during the period heretofore mentioned on the above described properties, did purchase goods, wares, merchandise, electricity and water and did borrow money from the herein-after mentioned persons in the amounts set forth after their names, all of which was used for the raising of potatoes on said properties by said partnership for the benefit of said partnership as follows, to wit:

Rexroth & Rexroth.....	\$ 282.54
General Petroleum Corporation.....	36.06
A. H. Karpe.....	169.83
Stroud-Seabrook	106.58
Bakersfield Hardware Co.....	50.32

Wasco Hardware Co.....	68.46
Kern County Bank.....	2,154.35
Rosedale Warehouse Co.....	880.99
Pacific Gas & Electric Co.....	2,847.61
King Lumber Co.....	364.16
Central Canal Co.....	583.40
<hr/>	
Total	\$7,544.30

That all of said amounts are owing to said creditors and have not been paid.

7. That the trustee of Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, has in his possession cash in the sum of \$1,471.77 being money obtained from the sale of personal property, of \$271.50 for potatoes, \$338.64 for sacks, \$119.13 for pipes, \$85.00 for potato roller, \$325.00 for Killefen carrier and ditcher, \$125.00 for twine, \$40.00 for 200 gallon gas tank, \$150.00 for 1000 gallon gas tank and pump, and \$17.50 for five grease guns, which belongs to Gerry Horton Farms, a partnership composed of Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, and Kaufman-Brown Potato Company a copartnership composed of Charles H. Kaufman and Albert H. Brown, and that there are no other assets belonging to said partnership and that of said sum above mentioned \$383.22 has been expended in administration costs. That Gerry Horton individually has no assets other than those exempt, and J. D. Althouse individ-

ually has no assets other than those exempt; that Gerry Horton Company, a copartnership composed of Gerry Horton and J. D. Althouse, has cash on hand in the sum of \$1,908.77 and no other assets, and claims filed and approved in the sum of over \$38,092.31, and that Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, has cash on hand in the sum of \$10,-742.43 and no other assets, and claims filed and approved in the sum of over \$48,530.14; that no fees have been paid to the attorney for the trustee and the former attorneys for the trustee, nor has the trustee been paid in full, nor have referee's fees, expenses and commissions been paid in full.

8. That none of the allegations of Kaufman-Brown Potato Company's answer are true except those allegations herein found to be true.

From the foregoing findings of fact, the referee makes his conclusions of law as follows, to wit: [80]

Conclusions of Law

1. That by reason of the partnership agreements heretofore mentioned and by the conduct of Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, and each of them, the said copartnership of Kaufman-Brown Potato Company and Charles H. Kaufman and Albert H. Brown each became individually and severally liable for the payment of the debts and obligations mentioned and

described in paragraph 7 of the findings, and trustee fees, attorney fees for trustee's attorney, and all other bankrupt expense in connection with Gerry Horton Farms, the partnership which was raising potatoes.

2. That Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, is a general partner of the partnership of Gerry Horton Farms, a partnership composed of Kaufman-Brown Potato Company, a co-partnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a co-partnership consisting of Gerry Horton and J. D. Althouse.

3. That Charles H. Kaufman, Albert H. Brown and Kaufman-Brown Potato Company, a copartnership composed of said parties, both by reason of their acts and their conduct and in particular by surrendering of the assets of Gerry Horton Farms, a partnership, to the trustee for the administration thereof, and the filing of certain proof of debt claimed against said partnership are now estopped from denying that they did not consent to the adjudication in bankruptcy against said partnership and by the filing of the involuntary petition in bankruptcy consented to adjudication in bankruptcy of said partnership and to the administration of the said partnership property and the assets in bankruptcy proceedings; and accordingly the court herein having acquired jurisdiction of Gerry Hor-

ton Farms, the partnership composed of said Kaufman-Brown Potato Company, a copartnership, and Gerry Horton Farms, a copartnership, has, by virtue of the provisions of the Bankruptcy Act, jurisdiction of the administration of said partnership; and that the order of adjudication should be corrected, amended and modified by adding thereto, in addition to those adjudged bankrupts, "Gerry Horton Farms, a partnership composed of Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse." [81]

4. That Wayne Long be appointed and/or continue as trustee of said partnership, without any additional bond.

Dated: May 22, 1948.

WILLIAM A. MCGUGIN,
Referee. [82]

EXHIBIT "B"

[Title of District Court and Cause.]

ORDER

By reason of the law and findings of fact and conclusions of law on file herein,

It Is Ordered and Decreed:

1. That the order of adjudication of bankruptcy dated August 15, 1944, signed by Waldo R. Bergman, Referee in Bankruptcy, be and it is hereby

amended and modified by changing the first paragraph of said order to read as follows:

“At Bakersfield, in the Southern District of California, on the 15th day of August, 1944, before Honorable Waldo R. Bergman, Referee in Bankruptcy, the petition of Kaufman-Brown Potato Company, a copartnership, Earl Cecil and J. Deacy Brown doing business as Rosedale Warehouse Company, a copartnership, and John Lewis praying that Gerry Horton Company and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, and Gerry Horton and J. D. Althouse, individually, be adjudicated bankrupts within the true intent and meaning of the Act of Congress relating to bankruptcy, having been [83] heard and duly considered; and it appearing that Gerry Horton Company is a partnership composed of J. D. Althouse and Gerry Horton; that Gerry Horton Farms, a copartnership, not engaged in the raising of potatoes, is composed of Gerry Horton and J. D. Althouse; that Gerry Horton Farms, a partnership engaged in the raising of potatoes, is composed of Kaufman-Brown Potato Company, a copartnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse; and that said partnerships of Gerry Horton Company, Gerry Horton Farms, not engaged in the raising of potatoes, and Gerry Horton Farms, a partnership engaged in the raising of potatoes, and Gerry Horton, an individual, and J. D. Althouse, an individual, are all insolvent and

that Kaufman-Brown Potato Company, a copartnership, one of the general partners of Gerry Horton Farms, the partnership engaged in the raising of potatoes, consented to the adjudication in bankruptcy and administration of the estate of Gerry Horton Farms, a partnership.”

2. That Gerry Horton Company, a copartnership composed of Gerry Horton and J. D. Althouse; Gerry Horton Farms, the partnership not engaged in the raising of potatoes composed of Gerry Horton and J. D. Althouse; Gerry Horton Farms, a partnership engaged in the raising of potatoes composed of Kaufman-Brown Potato Company, a copartnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership consisting of Gerry Horton and J. D. Althouse; Gerry Horton, an individual; and J. D. Althouse, an individual, is each a bankrupt under the Act of Congress relating to bankruptcy and each is hereby declared and adjudged a bankrupt accordingly.

3. That Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, a general partner of the partnership of Gerry Horton Farms, the partnership engaged in the raising of potatoes, is individually liable and severally liable with the two partners of Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown, for the payment of the debts and obligations of said Gerry Horton Farms, a partnership, together with trustee's fees,

attorney's fees for the attorney for the trustee, and referee's fees, expenses and [84] commissions, and all other bankruptcy court expense; and the creditors of said Gerry Horton Farms, a partnership, to which said partnership of Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown are liable as above mentioned are as follows, according to the amounts set forth after each creditor's name, to wit:

Rexroth & Rexroth.....	\$ 282.54
General Petroleum Corporation.....	36.06
A. H. Karpe.....	169.83
Bakersfield Hardware Co.....	50.32
Stroud-Seabrook	106.58
Wasco Hardware Co.....	68.46
Kern County Bank.....	2,154.35
Rosedale Warehouse Co.....	880.99
Pacific Gas & Electric Co.....	2,847.61
King Lumber Co.....	364.16
Central Canal Co.....	583.40
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Total	\$7,544.30

4. That Wayne Long continue as trustee of both of said partnerships of Gerry Horton Farms without any additional or other bond than the bonds heretofore given and that he transfer from the bank

account of Gerry Horton Farms, the copartnership not engaged in the raising of potatoes, the sum of \$1,087.95 to Gerry Horton Farms, the partnership engaged in the raising of potatoes.

Dated: May 22, 1948.

WILLIAM A. McGUGIN,
Referee in Bankruptcy.

Judgment entered Aug. 29, 1949.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 29, 1949.

[Title of District Court and Cause.]

KAUFMAN, BROWN POTATO COMPANY,
Claimant.

PROOF OF UNSECURED DEBT
AND LETTER OF ATTORNEY

At Bakersfield, California, in said Southern District of California, on the 15th day of September, A.D., 1944, came Philip Banovitz, of, in the County of, and State of, in said District of * * * *, and made oath and says:

Deponent is the authorized agent of Kaufman Brown Potato Company, in the County of Kern, and State of California. This deposition cannot be made by said principal in person because Kaufman Brown Potato Company, is a co-partnership

consisting of Charles H. Kaufman and Albert H. Brown, whose principal place of business and residence is Chicago, Illinois and deponent is duly authorized by his said principal to make this affidavit, and to execute the letter of Attorney incorporated herein and has executed such letter of attorney on behalf of said principal, and it is within his knowledge that the hereinafter mentioned debt was incurred as and for the consideration hereinafter mentioned, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

That the above named bankrupts, the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said claimant in the sum of \$23,479.79, and the nature and consideration of said debt are as follows: Labor, services, goods, wares and merchandise sold and delivered within two years last past by the claimant, an itemized bill of which, marked "Exhibit A" is hereto annexed, and referred to as a part hereof: That the sum of \$22,594.82 of said amount represents the balance of money due claimant as partial repayment of advances made for the growing of the crop of potatoes; and the sum of \$884.97 represents overdrafts on drafts drawn on claimant by debtors. That all of said sums were represented by checks delivered to claimant, which checks are attached hereto marked Exhibit A and made a part hereof.

That no part of said debt has been paid, no note has been received for said indebtedness nor for any part thereof, nor has any judgment been rendered thereon, except as hereinabove stated; that there are no setoffs or counterclaims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill; and that said claimant has not, nor has any other person by claimant's order, or to the knowledge or belief of deponent, or for claimant, had or received any manner of security whatsoever for said debt. Your claimant avers that every part of the obligation herein sought to be proved [87] is free from usury as defined by the laws of the place where the said debt was contracted.

Said claimant hereby constitutes and appoints Donald Kendall claimant's true and lawful attorney in fact to represent said claimant in said matters, with full authority to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings, or at which meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of the undersigned to vote for or against any proposal or resolution that may be then submitted under the

Acts of Congress relating to Bankruptcy; and in the choice of trustee or trustees of the estate of said bankrupt, and for the undersigned to assent to such appointment of trustee, and with like powers to attend and vote in any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due the undersigned under any composition, and for any other purpose whatsoever in the interest of the undersigned, with full power of substitution, and the undersigned does hereby revoke any and all prior powers of attorneys that may have been given by the undersigned.

(Personal signature here only.)

PHILIP BANOVITZ,

Deponent.

Mail all dividends and Notices to the following address: 306 Habermelde Bldg., Bakersfield, California.

Subscribed, sworn to and acknowledged before me this 15th day of September, 1944.

REBA NEATE,

Notary Public in and for the County of Los Angeles,
State of California.

CERTIFICATE OF TRUE COPY

United States of America,
Southern District of California,
Northern Division—ss.

I, William A. McGugin, Referee in Bankruptcy in and for the County of Fresno, State of California, in and for the said district, do hereby certify that the foregoing is a true and correct copy of Proof of Unsecured Debt and Letter of Attorney in the above entitled matter as the same appears of record in the proceedings in said matter now on file in my office.

In Witness Whereof, I have hereunto set my hand this 20th day of July, 1948.

/s/ WILLIAM A. McGUGIN,

Referee in Bankruptcy. [88]

[Title of District Court and Cause.]

OBJECTION TO CLAIM OF KAUFMAN-
BROWN POTATO COMPANY, A CO-PART-
NERSHIP COMPOSED OF CHARLES H.
KAUFMAN AND ALBERT H. BROWN

The petition of Wayne Long respectfully shows:

I.

That your petitioner is the duly appointed, qualified, and acting trustee of the above bankrupt estate.

II.

That on or about the 16th day of September, 1944, Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, filed its Proof of Claim of unsecured debt in the sum of \$23,479.79, but that said Kaufman-Brown Potato Company and each of said partners were partners or joint adventurers with said Bankrupts in the operations of the farming business of said Bankrupts at the time the alleged Indebtedness was incurred, and that said alleged indebtedness is in connection with the farming business.

III.

That Donald Kendall was named as attorney for said creditor in said Proof of Claim.

Wherefore, petitioner prays that an order to show cause be issued against said creditor, requiring it to appear at a certain date and show cause, if any it has, as to why said claim should not be rejected and disallowed and upon the hearing had thereon, that the Court make its order rejecting and disallowing said claim.

/s/ C. W. JOHNSTON,

Attorneys for Trustee.

WAYNE LONG,

Trustee. [89]

United States of America,
Southern District of California,
Northern Division,
County of Kern—ss.

C. W. Johnston, being duly sworn, says That he is Attorney for the Trustee in the foregoing entitled matter; that he has read the foregoing Objection to Claim and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters, that he believes it to be true and that the reason that this verification is made by the attorney instead of the trustee is that the trustee is not in the County of Kern at the time this verification is made.

/s/ C. W. JOHNSTON.

Subscribed and sworn to before me this 24th day of Oct., 1946.

[Seal] /s/ MILDRED UHLER,
Notary Public in and for the County of Kern, State
of California.

[Endorsed]: Filed Oct. 24, 1946. [90]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

The trustee of the above bankrupt having filed a petition that the claim of Kaufman-Brown Potato Company in the sum of \$23,479.79, which claim

was filed as unsecured claim, be rejected and disallowed for the reasons set forth in said petition; and it appearing that there are good and sufficient reasons therefor,

Therefore It Is Ordered that Kaufman-Brown Potato Company, a co-partnership composed of Charles H. Kaufman and Albert H. Brown, be ordered to appear before the undersigned Referee at his office, 130 Morgan Building, Bakersfield, Kern County, California, on the 9th day of November, 1946, at the hour of 10 a.m. to show cause, if any it has, why the above mentioned claim should not be rejected and disallowed.

It Is Further Ordered that a copy of this order together with a copy of the petition be served upon said alleged creditor or his attorney of record at least five (5) days prior to the date set for hearing, or that same may be served by registered mail with return receipt showing that the same was delivered five (5) days prior to the date set for hearing.

Dated: October 24, 1946.

/s/ WALDO R. BERGMAN,
Referee in Bankruptcy.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 28, 1946. [91]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW AS TO KAUFMAN-BROWN POTATO
COMPANY CLAIM

Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, filed a claim of unsecured debt in the sum of \$23,479.79 in the above bankruptcy proceedings and the trustee having filed objection to the claim that said Kaufman-Brown Potato Company was a joint venturer with Gerry Horton Farms in the operation of the farming business in the raising of potatoes at the time the alleged indebtedness was incurred, and that said alleged indebtedness was in connection with the growing of potatoes by said joint venture, and the matter having been set for hearing on the 9th day of November, 1946, and the matter continued from time to time at the request of Kaufman-Brown Potato Company and hearings were had at various times and final hearing was had before the referee on the 8th day of December, 1947, Kaufman-Brown Potato Company being represented by Donald Kendall and the trustee in bankruptcy being represented by C. W. Johnston, and evidence having been introduced, both oral and documentary, and the referee being fully advised in the premises does hereby make his findings [92] of fact, to wit:

Findings of Fact

1. That Wayne Long is the duly appointed, qualified and acting trustee of the bankrupt estates of Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse; Gerry Horton Company, a copartnership composed of Gerry Horton and J. D. Althouse; and Gerry Horton Farms, a joint venture composed of Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, and Kaufman-Brown Potato Company, a copartnership consisting of Charles H. Kaufman and Albert H. Brown.

2. That on or about the 16th day of September, 1944, Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, filed its proof of claim of unsecured debt in the sum of \$23,479.79 in the above bankruptcy proceedings.

3. That said Kaufman-Brown Potato Company, a copartnership, advanced the sum of \$884.97, and no more, to Gerry Horton Company, a copartnership, and that said sum has not been repaid and is still owing to said Kaufman-Brown Potato Company by Gerry Horton Company.

4. That Kaufman-Brown Potato Company, a copartnership, advanced the sum of \$22,594.82 to Gerry Horton Farms, a joint venture composed of Gerry Horton Farms, a copartnership, and Kaufman Brown Potato Company, a copartnership, and

the said sum has not been paid and said sum is still due and owing by said joint venture to said Kaufman-Brown Potato Company; and that said sum of money was used by said joint venture in the raising of potatoes by said joint venture and that said sum was not advanced or loaned to Gerry Horton Farms, a copartnership composed only of J. D. Althouse and Gerry Horton.

From the foregoing findings of fact the referee makes his conclusions of law as follows, to wit:

Conclusions of Law

1. That Gerry Horton Company, a copartnership, is indebted to Kaufman-Brown Potato Company, a copartnership, in the sum of \$884.97 and the claim of Kaufman-Brown Potato Company should be allowed against the bankrupt estate of Gerry [93] Horton Company for the sum of \$884.97.

2. That Gerry Horton Farms, a copartnership composed of only Gerry Horton and J. D. Althouse, is not indebted to Kaufman-Brown Potato Company, a copartnership, in any sum or at all, and claim of Kaufman-Brown Potato Company should be denied as against said copartnership.

3. That Gerry Horton Farms, a joint venture composed of Kaufman-Brown Potato Company, a copartnership, and Gerry Horton Farms, a copartnership, is indebted to Kaufman-Brown Potato Company in the sum of \$22,594.82; and that said

Kaufman-Brown Potato, a copartnership, is a general partner of said Gerry Horton Farms, a joint venture, bankrupt, and said claim should be disallowed against Gerry Horton Farms, a joint venture, until all other creditors have been paid in full and all expenses of administration have been paid in full.

Dated: May 22nd, 1948.

/s/ WILLIAM A. McGUGIN,
Referee.

[Endorsed]: Filed May 22, 1948. [94]

[Title of District Court and Cause.]

ORDER

By reason of the law and the findings of fact and conclusions of law on file herein,

It Is Ordered:

1. That the claim of Kaufman-Brown Potato Company be allowed against Gerry Horton Company, a copartnership, for the sum of \$884.97 and for no other sum.

2. That the claim of Kaufman-Brown Potato Company be disallowed against Gerry Horton Farms, a copartnership composed only of J. D. Althouse and Gerry Horton.

3. That the balance of said claim of Kaufman-Brown Potato Company, being \$22,594.82, be dis-

allowed against Gerry Horton Farms, a joint venture composed of Gerry Horton Farms, a co-partnership, and Kaufman-Brown Potato Company, a copartnership, until all other creditors of said joint venture have been paid in full and all expenses of administration of said joint venture have been paid in full.

Dated: May 22nd, 1948.

/s/ WILLIAM A. McGUGIN,
Referee.

[Endorsed]: Filed May 22, 1948. [95]

[Title of District Court and Cause.]

PETITION FOR REVIEW

The petition of Kaufman-Brown Potato Company, a partnership composed of Charles H. Kaufman and Albert H. Brown, respectfully shows:

I.

On May 22, 1948, William A. McGugin, a Referee in Bankruptcy of the above entitled court, signed, filed and entered in the above entitled proceeding his findings of fact, conclusions of law and order allowing the general unsecured claim for \$23,479.79 filed herein by said Kaufman-Brown Potato Company, a creditor of the above named bankrupts, for \$884.97 only, and disallowed the balance of said claim against Gerry Horton Farms, a joint venture alleged to be composed of the above named bank-

rupts and the said creditor, until all other creditors of the said alleged joint venture, and all [96] expenses of administration of the said joint venture have been paid in full.

II.

The said order is erroneous for the following reasons:

1. The said order and the findings of fact and conclusions of law upon which it is based are premised upon the theory that joint ventures are subject to bankruptcy, whereas in the National Bankruptcy Act of 1898, as amended, no provision is made for the bankruptcy of joint ventures, at least for a single transaction such as the one here, either as voluntary bankrupts or as involuntary bankrupts.

2. The said order and the findings of fact and conclusions of law upon which it is based are premised upon the assumption that the above named bankrupts and the said creditor engaged in a joint venture for the growing, harvesting and sale of a potato crop, whereas the evidence in this case discloses that no such joint venture existed, in that:

- a. The written contracts between the parties, dated November 16, 1943 and January 22, 1944, by their terms, negative any time to create a joint venture, because they did not contemplate or provide for any community of interest between the parties with respect to the right to make contracts,

incur liabilities, participate in the management of the business, and the like.

b. There was not any joint management or control of the business of growing, harvesting and selling the said crop. Such management and control rested solely with the above named bankrupts (Rep. Tr., Dec. 8, 1947, p. 83). Nor did the said creditor have anything to do with the buying of supplies or materials, or the hiring or firing of help, and all such matters were handled exclusively by the said bankrupts (Rep. Tr., Dec. 8, 1947, p. 82).

c. The conduct of the parties under the contract negatives a joint venture, in that: (1) the complete control, [97] management and operation of the transaction was solely in the hands of, and solely carried out by the above named bankrupts; and neither the said creditor, nor either of the partners thereof had any part in the operation of such business (Rep. Tr., Dec. 8, 1947, p. 83; May 12-13, 1947, p. 24, 25); (2) the leases to Gerry Horton Farms, where the potatoes were grown, and the equipment used in the transaction belonged solely to the above named bankrupt at all times, and no interest therein was ever transferred to any joint venture or to said creditor (Rep. Tr., Dec. 8, 1947, p. 41, 81); (3) the above named bankrupts were engaged generally in the business of buying, selling and speculating in potatoes (Rep. Tr., Dec. 8, 1947, p. 54, 63); (4) the money advanced by the said creditor was not deposited to the credit of any joint venture, or to the credit of the above named bankrupts and the said creditor, but solely to the

credit of the above named bankrupts, the checks drawn upon the said account were by the above named bankrupts only, and the said creditor did not have any right to draw upon said account for anything (Rep. Tr., Dec. 8, 1947, p. 84); (5) the above named bankrupts sent the said creditor their checks in reduction of the advances made by said creditor to the bankrupts, and on said checks the bankrupts wrote the words "on loan," which checks were subsequently dishonored (Rep. Tr., p. 73, 74 and 75); (6) a crop mortgage was given by the above named bankrupts to the said creditor to secure the repayment of advances made by the said creditor to the said bankrupts in connection with the said transaction (Rep. Tr., May 12-13, 1947, p. 15-19); (7) there were not any business transactions between the above named bankrupts and the said creditor, other than the single transaction here in question with respect to the potato deal (Rep. Tr., May 12-13, 1947, p. 24); (8) the above named bankrupts shipped to the said creditor at Chicago a portion of the harvested crop, the said creditor paid the said bankrupts for such shipment, and the money so received by the said bankrupts was deposited to their own account and not to [98] the credit of any joint venture (Rep. Tr., Dec. 8, 1947, p. 83); (9) all liabilities in connection with the growing, harvesting and selling of the potato crop were incurred by the above named bankrupts; and (10) the said creditor did not make any contracts, incur any liabilities, or participate in the management of the transaction.

3. In view of the foregoing, findings of fact Nos. 3 and 4 are unsupported by the evidence and clearly erroneous; and the conclusions of law likewise.

Wherefore, petitioner prays that said order be reversed and that the said referee be instructed to enter an order allowing the said creditor's claim for \$23,479.79 against the estates of the above named bankrupts for the full amount thereof; and for general relief.

Dated: June 1, 1948.

KAUFMAN-BROWN
POTATO COMPANY,
a partnership, by
SAMUEL C. COLBY and
GRAINGER & HUNT,
/s/ REUBEN G. HUNT,
Its Attorneys.

State of California,
County of Los Angeles—ss.

Samuel C. Colby, being first duly sworn, deposes and says: I am one of the attorneys for the within named petitioner and make this verification for and on its behalf, for the reasons that neither of the partners of the petitioner is within the County of Los Angeles, where I and my associates, Grainger and Hunt, have our offices, and the matters stated in the said petition are within my knowledge.

I have read the said petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

/s/ SAMUEL C. COLBY.

Subscribed and sworn to before me this 4th day of June, 1948.

[Seal] /s/ RHAE LICHT,
Notary Public, Los Angeles County, Calif.

Affidavit of service by mail attached.

[Endorsed]: Filed June 5, 1948. [99]

[Title of District Court and Cause.]

CERTIFICATE BY REFEREE TO JUDGE ON
ORDER DISALLOWING CLAIM OF
KAUFMAN-BROWN POTATO COMPANY
IN PART

I, William A. McGugin, Referee in Bankruptcy in charge of the above entitled proceedings, in response to the Petition for Review filed by the Kaufman-Brown Potato Company from an order disallowing the claim of said Kaufman-Brown Potato Company except for the sum of \$884.97 in this bankruptcy proceedings made by me on the 22nd day of May, 1948, do hereby certify to the Judge as follows:

That a hearing was had upon an order to show cause to determine whether or not Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms in the raising of potatoes in Kern County during the period from November 16, 1943 to July 8, 1944.

Is the claim of Kaufman-Brown Potato Company on file in this proceedings a proper and valid claim against the Gerry Horton Farms partnership? [101]

I further certify that a petition in involuntary bankruptcy was filed against the bankrupts named in the title herein by three creditors, one of whom was Kaufman-Potato Company; that the proceedings was referred to Waldo R. Bergman, as Referee and Special Master; that thereafter I replaced Waldo R. Bergman in such capacity upon my appointment on July 1, 1947; that a stipulation was entered into by counsel for the parties in this proceedings agreeing that the evidence heard by Mr. Bergman and written up in transcript could be read by myself and considered as evidence herein; that further hearing was held on various continued dates and that on May 22, 1948 I made and entered an order holding that Kaufman-Brown Potato Company, a copartnership, was a general partner of Gerry Horton Farms, a copartnership; that the facts and record of proceedings in the hearing on the said question of copartnership is now before your Honor on a companion Certificate on Review; that the question involved in this certificate necessarily depends upon the question in the partnership certificate.

That since Kaufman-Brown Potato Company was held to be a general partner of Gerry Horton Farms the claim of Kaufman-Brown Potato Company against the partnership of Gerry Horton Farms

was necessarily held to be subsequent in order to claims of all other creditors.

That reference is hereby made to the certificate filed in company herewith for the further facts, proceedings and references in this matter.

The questions for the Court to determine are as follows:

1. Was the order of the Referee partially disallowing the claim of Kaufman-Brown Potato Company proper considering the facts and the premises and that Kaufman-Brown Potato [102] Company was a copartner of the bankrupts involved?

I hereby certify to the District Judge the following documents:

1. Petition for Review.
2. Certified copy of Claim of Kaufman-Brown Potato Co.
3. Objection of Trustee to Claim of Kaufman-Brown Potato Co.
4. Order to Show Cause.
5. Transcript of hearing of March 21, 1947.
6. Transcript of evidence of Charles H. Kaufman.
6. Transcript of evidence of Gerry Horton.
7. Findings of Fact and Conclusions of Law.
8. Order partially disallowing Claim.
9. All documents handed up with companion certificate on review.

10. Involuntary petition filed in bankruptcy on the 5th day of August, 1944, signed by Kaufman-Brown Potato Company among others—by reference to original in clerk's office.

11. Certified copy of Adjudication of Gerry Horton Company, a copartnership, J. D. Althouse and Gerry Horton, individually; Gerry Horton Farms, a copartnership. (Attached to Item 2 of companion certificate handed up herewith.)

12. Certified copy of Order Approving Trustee's Bond. (Attached to documents handed up with companion certificate.)

13. Stipulation of counsel agreeing that William A. McGugin act as special master instead and in place of Waldo R. Bergman, and that all testimony previously taken be considered by him. (Attached to documents handed up with companion certificate.)

14. Certified copy of Order of General Reference. (Attached to Item 2 of companion certificate handed up herewith.) [103]

16. Referee's Memorandum of Opinion. (Attached to documents handed up with companion certificate.)

17. This Certificate.

Respectfully submitted this 16th day of July, 1948.

/s/ WILLIAM A. MCGUGIN,
Referee in Bankruptcy.

[Endorsed]: Filed July 22, 1948. [104]

In the District Court of the United States, for
the Southern District of California, Northern
Division.

No. 6180

In the Matter of:

GERRY HORTON and J. D. ALTHOUSE, doing
business as GERRY HORTON COMPANY, a
copartnership, GERRY HORTON and J. D.
ALTHOUSE, doing business as GERRY HOR-
TON FARMS, a copartnership, GERRY HOR-
TON, an individual, and J. D. ALTHOUSE,
and individual,

Bankrupts.

ORDER

The petition of Kaufman-Brown Potato Com-
pany for review of Referee's order disallowing the
claim of Kaufman-Brown Potato Company, a co-
partnership, in the sum of \$22,594.82 against Gerry
Horton Farms, the partnership, which was in the
business of raising potatoes and of which said
Kaufman-Brown Potato Company was a member,
came on regularly for hearing before the Honorable
C. E. Beaumont, Judge of the above entitled Court,
on the 29th day of October, 1948; Samuel C. Colby
and Reuben G. Hunt of the Law Firm of Grainger
and Hunt, appearing as Attorneys for Kaufman-
Brown Potato Company, and C. W. Johnston, of
the Law Firm of Johnston, Baker and Palmer,
appearing as Attorney for the trustee of said bank-

rupts, and the matter having been argued by the attorneys for the respective parties, and the matter having been submitted, and it appearing to the Court from the evidence that Kaufman-Brown Potato Company was a partner of Gerry Horton Farms, a copartnership, in the business of raising potatoes, and that said sum of money was loaned by said Kaufman-Brown Potato Company to Gerry Horton Farms, the [105] partnership, in the business of raising potatoes, composed of Gerry Horton Farms, a copartnership, not then in the business of raising potatoes, and Kaufman-Brown Potato Company, a copartnership, and that the Referee, in his findings of fact and conclusions of law and order, designated Gerry Horton Farms as a "joint venture" so that it would not be confused with Gerry Horton Farms, the copartnership, which was not in the business of raising potatoes, and of which Kaufman-Brown Potato Company was not a partner; and the Attorney for the trustee at the time of hearing having requested that the findings of fact and conclusions of law and order be modified by eliminating the words "joint venture" and inserting in lieu thereof the word "partnership" or other appropriate words so that there would be no doubt or question that said Gerry Horton Farms of which Kaufman-Brown Potato Company was a member, was a partnership; and the Court adopts and confirms the Referee's findings of fact and conclusions of law and order, excepting only that they are amended by eliminating the words "joint

venture” and inserting in lieu thereof the word “partnership,” so that the findings of fact and conclusions of law will read as amended by the Court according to Exhibit “A” attached hereto, and the judgment order will read according to Exhibit “B” attached hereto.

It Is Therefore Ordered, Adjudged and Decreed that the findings of fact and conclusions of law and order of the Referee determining that Kaufman-Brown Potato Company, composed of Charles H. Kaufman and Albert H. Brown, claim for \$22,594.82 against Gerry Horton Farms, the partnership, engaged in the business of raising potatoes, be denied until all creditors had been paid is hereby confirmed, approved and adopted, as amended, by this Court according to Exhibits “A” and “B” attached hereto.

Dated: August 29, 1949.

/s/ C. E. BEAUMONT,
Judge. [106]

EXHIBIT “A”

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO KAUFMAN-BROWN PO- TATO COMPANY CLAIM

Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, filed a claim of unsecured debt in the

sum of \$23,479.79 in the above bankruptcy proceedings and the trustee having filed objection to the claim on the ground that said Kaufman-Brown Potato Company was a partner with Gerry Horton Farms in the operation of the farming business in the raising of potatoes at the time the alleged indebtedness was incurred, and that said alleged indebtedness was in connection with the growing of potatoes by said partnership and the matter having been set for hearing on the 9th day of November, 1946, and the matter continued from time to time at the request of Kaufman-Brown Potato Company and hearings were had at various times and final hearing was had before the referee on the 8th day of December, 1947, Kaufman-Brown Potato Company being represented by Donald Kendall and the trustee in bankruptcy being represented by C. W. Johnston, and evidence having been introduced, both oral and documentary, and the referee being fully advised in the premises does hereby make his findings of fact, to wit: [107]

Findings of Fact

1. That Wayne Long is the duly appointed, qualified and acting trustee of the bankrupt estates of Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse; Gerry Horton Company is a copartnership composed of Gerry Horton and J. D. Althouse; and Gerry Horton Farms, is a partnership composed of Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, and Kaufman-Brown

Potato Company, a copartnership consisting of Charles H. Kaufman and Albert H. Brown.

2. That on or about the 16th day of September, 1944, Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, filed its proof of claim of unsecured debt in the sum of \$23,479.79 in the above bankruptcy proceedings.

3. That said Kaufman-Brown Potato Company, a copartnership, advanced the sum of \$884.97, and no more, to Gerry Horton Company, a copartnership, and that said sum has not been repaid and is still owing to said Kaufman-Brown Potato Company by Gerry Horton Company.

4. That Kaufman-Brown Potato Company, a copartnership, advanced the sum of \$22,594.82 to Gerry Horton Farms, the partnership composed of Gerry Horton Farms, a copartnership, and Kaufman-Brown Potato Company, a copartnership, and the said sum has not been paid and said sum is still due and owing by said partnership to said Kaufman-Brown Potato Company; and that said sum of money was used by said partnership in the raising of potatoes by said partnership and that said sum was not advanced or loaned to Gerry Horton Farms, the copartnership composed only of J. D. Althouse and Gerry Horton.

From the foregoing findings of fact the referee makes his conclusions of law as follows, to wit:

Conclusions of Law

1. That Gerry Horton Company, a copartnership, is indebted to Kaufman-Brown Potato Company, a copartnership, in the sum of \$884.97 and the claim of Kaufman-Brown Potato Company should be allowed against the bankrupt estate of Gerry Horton Company for the sum of \$884.97.

2. That Gerry Horton Farms, the copartnership composed of only Gerry Horton and J. D. Althouse, is not indebted to Kaufman-Brown Potato Company, a copartnership, in any sum or at all, and claim of Kaufman-Brown Potato Company should be denied as against said copartnership.

3. That Gerry Horton Farms, the partnership composed of Kaufman-Brown Potato Company, a copartnership, and Gerry Horton Farms, a copartnership, is indebted to Kaufman-Brown Potato Company in the sum of \$22,594.82; and that said Kaufman-Brown Potato Company, a copartnership, is a general partner of said Gerry Horton Farms, the said partnership, and said claim should be disallowed against said Gerry Horton Farms, a partnership, until all other creditors have been paid in full and all expenses of administration have been paid in full.

Dated: May 22, 1948.

WILLIAM A. McGUGIN,
Referee. [109]

EXHIBIT "B"

[Title of District Court and Cause.]

ORDER

By reason of the law and the findings of fact and conclusions of law on file herein,

It Is Ordered:

1. That the claim of Kaufman-Brown Potato Company be allowed against Gerry Horton Company, a copartnership, for the sum of \$884.97 and for no other sum.

2. That the claim of Kaufman-Brown Potato Company be disallowed against Gerry Horton Farms, the copartnership composed only of J. D. Althouse and Gerry Horton.

3. That the balance of said claim of Kaufman-Brown Potato Company, being \$22,594.82, be disallowed against Gerry Horton Farms, the partnership composed of Gerry Horton Farms, a copartnership, and Kaufman-Brown Potato Company, a copartnership, until all other creditors of said partnership have been paid in full and all expenses of administration of said partnership have been paid in full.

Dated: May 22, 1948.

WILLIAM A. McGUGIN,
Referee. [110]

Affidavit of service by mail attached.

Judgement entered Aug. 29, 1949.

[Endorsed]: Filed Aug. 29, 1949. [111]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Hon. Campbell E. Beaumont, Judge of the
United States District Court:

To Wayne Long, as Trustee in Bankruptcy of the
Estates of the Above Named Bankrupts, and
to His Attorneys of Record, Harvey, Johnston,
Baker and Palmer, and C. W. Johnston,
Esquire: and to Edmund L. Smith, Clerk of
the District Court:

You and Each of You Will Please Take Notice,
and Notice Is Hereby Given that Kaufman-Brown
Potato Company, a partnership composed of Charles
H. Kaufman and Albert H. Brown, and the said
Charles H. Kaufman and said Albert H. Brown,
and each of them hereby appeal to the United States
Court of Appeals for the Ninth Circuit, from that
order, final judgment and decree and the whole
thereof filed, docketed and entered in the above en-
titled matter on the 25th day of July, 1949, and
reading as follows: [112]

“The Court having heretofore taken under sub-
mission the petition of Kaufman-Brown Potato
Company for review of the Referee’s order, now
finds that there is sufficient evidence to support the
Referee’s findings, and by filing of the petition in
involuntary bankruptcy, Kaufman-Brown Potato
Company consented to adjudication. The Court

adopts and confirms the Referee's findings as amended, and his order as amended is affirmed."

Dated this 24th day of August, 1949.

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

[Endorsed]: Aug. 24, 1949. [113]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Campbell E. Beaumont, Judge
of the United States District Court:

To Wayne Long, as Trustee in Bankruptcy of the
Estates of the Above Named Bankrupts, and
to His Attorneys of Record, Harvey, Johnston,
Baker and Palmer, and C. W. Johnson,
Esquire, and to Edmund L. Smith, Clerk of
the Said District Court:

You and Each of You Will Please Take Notice
and Notice Is Hereby Given that Kaufman-Brown
Potato Company, a partnership composed of Charles
H. Kaufman and Albert H. Brown, and the said
Charles H. Kaufman and said Albert H. Brown,
and each of them hereby appeal to the United States
Court of Appeals for the Ninth Circuit from that
Order, Final Judgment and Decree, and the whole
thereof, filed, docketed and entered in the above en-
titled matter on the 29th day of August, 1949, which
said order, final judgment and decree was on said

day filed and entered in Judgment Book 5, at page 258 of the files and records [114] of the above entitled Court, and which said order determined that findings, conclusions and order of Referee determining Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms be confirmed, approved and adopted as amended by the Court, according to Exhibits "A" and "B" attached to said order.

Dated this 22nd day of September, 1949.

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

[Endorsed]: Sept. 22, 1949. [115]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Campbell E. Beaumont, Judge
of the United States District Court:

To Wayne Long, as Trustee in Bankruptcy of the
Estates of the Above Named Bankrupts, and
to His Attorneys of Record, Harvey, Johnston,
Baker and Palmer, and C. W. Johnson,
Esquire, and to Edmund L. Smith, Clerk of
the Said District Court:

You and Each of You Will Please Take Notice
and Notice Is Hereby Given that Kaufman-Brown
Potato Company, a partnership composed of Charles
H. Kaufman and Albert H. Brown, and the said
Charles H. Kaufman and said Albert H. Brown,

and each of them, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that Order, Final Judgment and Decree, and the whole thereof, filed, docketed and entered in the above entitled matter on the 29th day of August, [116] 1949, which said order, final judgment and decree was on said day filed and entered in Judgment Book 5, at Page 271, and which said order determined that Kaufman-Brown Potato Company's claim for \$22,594.82 against Gerry Horton Farms be denied until all creditors had been paid be confirmed and adopted as amended by Court, according to Exhibits "A" and "B" attached to said order.

Dated this 22nd day of September, 1949.

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

[Endorsed]: Filed Sept. 22, 1949. [117]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY UPON APPEAL FROM JUDGMENT ENTERED IN JUDGMENT BOOK 5, PAGE 258 (APPEAL FROM ORDER RE ADJUDICATION IN BANKRUPTCY).

Pursuant to Rule 75-d of Rules of Civil Procedure, the appellants make the following concise statement of points upon which they intend to rely upon this appeal.

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms, a partnership engaged in the raising of potatoes, though the evidence was insufficient to prove it was ever such a partner and, on the contrary, established that it was not a partner.

II.

The Order, Judgment and Decree of the Court in adjudicating Gerry Horton Farms, a partnership engaged in the raising of potatoes, composed of Kaufman-Brown Potato Company, a co-partnership consisting [118] of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, bankrupt, was erroneous in that said Kaufman-Brown Potato Company was not a co-partner and also in that neither the proceedings had nor the evidence adduced permitted or justified such Order.

Respectfully submitted,

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 29, 1949. [119]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY UPON AP-
PEAL FROM JUDGMENT ENTERED IN
JUDGMENT BOOK 5, PAGE 271 (APPEAL
RE DISALLOWANCE OF CLAIM).

Pursuant to Rule 75-D of Rules of Civil Procedure, the appellants make the following concise statement of points upon which they intend to rely upon this appeal.

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms, a partnership engaged in the raising of potatoes, though the evidence was insufficient to prove it was ever such a partner and, on the contrary, established that it was not a partner.

II.

The Order, Judgment and Decree of the Court in disallowing the major portion of the claim of Kaufman-Brown Potato Company, filed in the above-entitled Bankruptcy proceedings, was erroneous in that [121] Kaufman-Brown Potato Company was not a co-partner of Gerry Horton Farms and was improperly adjudged to be a co-partner in

an alleged co-partnership erroneously adjudged to be a bankrupt.

Respectfully submitted,

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 29, 1949. [122]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANTS WILL RELY UPON AP-
PEAL FILED AUGUST 24, 1949.

Pursuant to Rule 75-d of Rules of Civil Procedure, the appellants make the following concise statement of points upon which they intend to rely upon this appeal.

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms, a partnership engaged in the raising of potatoes, though the evidence was insufficient to prove it was ever such a partner and, on the contrary, established that it was not a partner.

II.

The Order, Judgment and Decree of the Court in disallowing the major portion of the claim of Kaufman-Brown Potato Company, filed in the

above-entitled Bankruptcy proceeding, was erroneous in [124] that Kaufman-Brown Potato Company was not a co-partner of Gerry Horton Farms, and was improperly adjudged to be a co-partner in an alleged co-partnership erroneously adjudged to be a bankrupt.

III.

The Order, Judgment and Decree of the Court in adjudicating Gerry Horton Farms, a partnership engaged in the raising of potatoes, composed of Kaufman-Brown Potato Company, a co-partnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, bankrupt, was erroneous in that said Kaufman-Brown Potato Company was not a co-partner and also in that neither the proceedings had nor the evidence adduced permitted or justified such Order.

Respectfully submitted,

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 29, 1949. [125]

[Title of District Court and Cause.]

EXTENSION OF TIME FOR FILING RECORD ON APPEAL AND DOCKETING THE APPEAL.

It appearing to the Court that Kaufman-Brown Potato Company, a partnership composed of Charles H. Kaufman and Albert H. Brown, and the said Charles H. Kaufman and Albert H. Brown, are appellants in each of the following appeals, to wit:

(a) Appeal filed on August 24, 1949 from Order, Decree and Final Judgment filed, docketed and entered in the above-entitled matter on the 25th day of July, 1949;

(b) Appeal filed on September 22, 1949 from Order, Decree and Final Judgment filed, docketed and entered in the above-entitled matter on the 29th day of August, 1949, which said Order, Decree and Judgment was on said day filed and entered in Judgment Book 5, at page 258 of the files and records of the above-entitled court; [127]

(c) Appeal filed on September 22, 1949 from Order, Decree and Final Judgment filed, docketed and entered in the above-entitled matter on the 29th day of August, 1949, which said Order, Decree and Final Judgment was on said day filed and entered in Judgment Book 5 at page 271 of the files and records of the above-entitled Court.

And it further appearing to the Court that said appellants in their designation of portions of the record, proceedings and evidence to be contained in

the record on appeal in each of said three appeals have set forth and designated the same portion of the records, proceedings and evidence;

And it further appearing that the time for filing the record on appeal with the Appellate Court and docketing the appeal, in each of said appeals so filed on September 22, 1949, will not expire until November 1, 1949, while the time for so filing and docketing the appeal filed August 24, 1949 will, unless an extension be granted, expire on October 3, 1949:

Now Therefore, good cause appearing therefor, and on motion of Samuel C. Colby, Esquire, and Kyle Z. Grainger, Esquire, Attorneys for Appellants, (Kyle Z. Grainger, of Counsel),

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed with the Appellate Court in said appeal filed on August 24, 1949 is hereby extended to and including November 1, 1949.

Dated: This 29th day of Sept., 1949.

/s/ PAUL J. McCORMICK,

Judge of the United States
District Court.

[Endorsed]: Filed Sept. 29, 1949. [128]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL IN EACH OF THREE APPEALS

To the Hon. Campbell E. Beaumont, Judge of the United States District Court:

To Wayne Long, as Trustee in Bankruptcy of the Estate of the Above Named Bankrupts, and to His Attorneys of Record, Harvey, Johnston, Baker and Palmer, and C. W. Johnston, Esquire, and to Edmund L. Smith, Clerk of the Said District Court:

The appellants in each of the following appeals, to wit:

(a) Appeal filed on August 24, 1949 from Order, Decree and Final Judgment filed, docketed and entered in the above-entitled matter on the 25th day of July, 1949;

(b) Appeal filed on September 22, 1949 from Order, Decree and Final Judgment filed, docketed and entered in the above-entitled matter on the 29th day of August, 1949, which said Order, Decree and Judgment was on said day filed and entered in Judgment Book 5, [129] at page 258 of the files and records of the above-entitled Court;

(c) Appeal filed on September 22, 1949 from Order, Decree and Final Judgment filed, docketed and entered in the above-entitled matter on the 29th

day of August, 1949, which said Order, Decree and Final Judgment was on said day filed and entered in Judgment Book 5 at page 271 of the files and records of the above-entitled Court; do designate the portions of the record proceedings and evidence to be contained in the record on appeal in each of said appeals as follows, to wit:

1. Involuntary Petition by Three Creditors;
2. Order of General Reference;
3. Order of Adjudication of Bankruptcy, and Order for filing schedules;
4. Certified Copy of Order Approving Trustee's Bond;
5. Petition for Order Amending, Modifying and Changing Order of Adjudication, and Petition for Order to Show Cause directed against partners;
6. Order to Show Cause (dated and filed November 15, 1946);
7. Answer to Order to Show Cause;
8. Stipulation that William A. McGugin Act as Special Master and as Referee in Place of Waldo R. Bergman;
9. Referee's Memorandum of Opinion;
10. Findings of Fact and Conclusions of Law (dated May 22, 1948, signed by William A. McGugin, Referee in Bankruptcy);
11. Order (Modifying Order of Adjudication

signed May 22, 1948, by William A. McGugin, Referee in Bankruptcy);

12. Petition for Review (From Order of Referee Modifying Order of Adjudication);

13. Certificate by Referee to Judge (on Order Modifying Adjudication to include Kaufman-Brown Potato Company as one of the General Partners of Gerry Horton Farms); [130]

14. Order (dated and filed August 29, 1949, confirming order of Referee determining that Kaufman-Brown Potato Company was a general partner, including Exhibits A and B);

15. Certified copy of Proof of Unsecured Debt and Letter of Attorney (Claim of Kaufman-Brown Potato Company);

16. Objection to Claim of Kaufman-Brown Potato Company, a co-partnership, composed of Charles H. Kaufman and Albert H. Brown;

17. Order to Show Cause (dated October 24, 1946, signed by Waldo R. Bergman, Referee in Bankruptcy);

18. Findings of Fact, Conclusions of Law (as to Kaufman-Brown Potato Company claim, dated May 22, 1948, signed by William A. McGugin, Referee in Bankruptcy);

19. Order (dated May 22, 1948, signed by William A. McGugin, Referee in Bankruptcy, disallowing claim of Kaufman-Brown Potato Company in part);

20. Petition for Review (from order of Referee in Bankruptcy Disallowing Claim of Kaufman-Brown Potato Co. in part);

21. Certificate by Referee to Judge on Order Disallowing claim of Kaufman-Brown Potato Company in part;

22. Order (Dated and filed August 29, 1949, confirming findings of fact and conclusions of law and order of the Referee determining that Kaufman-Brown Potato Company claim be denied until all creditors had been paid, including Exhibit A and B);

23. Reporter's Transcript of Proceedings had and testimony taken on Friday, March 21, 1947;

24. Reporter's Transcript of Testimony of Gerry Horton on December 8, 1947;

25. Crop Mortgage (Respondent's Exhibit "A");

26. Reporter's Transcript of Proceedings had and Testimony given on May 12-13, 1947;

27. Agreement dated January 22, 1944 (Respondent's Exhibit "D"); [131]

28. Agreement dated November 16, 1943 (Respondent's Exhibit "E");

29. Certified Copy of Minute Order entered in the Docket in the above-entitled matter on the 25th day of July, 1949, reading as follows:

"The Court having heretofore taken under submission the petition of Kaufman-Brown Potato Company for review of the Referee's Order, now

finds that there is sufficient evidence to support the Referee's findings; and by filing of the petition in involuntary bankruptcy, Kaufman-Brown Potato Company consented to adjudication. The Court adopts and confirms the Referee's findings as amended, and his order as amended is affirmed."

30. Notice of Appeal (Filed August 24, 1949);

31. Notice of Appeal (Filed September 22, 1949);

32. Notice of Appeal (Filed September 22, 1949);

33. Statement of points upon which Appellant Will Rely Upon Appeal (Appeal described in subdivision (a) above, filed on August 24, 1949);

34. Statement of points upon which Appellant Will Rely Upon Appeal. (Appeal described in subdivision (b) above, filed on September 22, 1949);

35. Statement of points upon which Appellant Will Rely upon Appeal (Appeal described in subdivision (c) above, filed on September 22, 1949).

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Kaufman-Brown Potato Company, a partnership composed of Charles H. Kaufman and Albert H. Brown, and the said Charles H. Kaufman and Albert H. Brown, Appellants in each of said appeals.

Affidavit of service by mail.

[Endorsed]: Filed Sept. 29, 1949. [132]

[Title of District Court and Cause.]

AMENDED STATEMENT OF POINTS UPON
WHICH APPELLANT WILL RELY UPON
APPEAL FROM JUDGMENT ENTERED
IN JUDGMENT BOOK 5, PAGE 271 (AP-
PEAL RE DISALLOWANCE OF CLAIM)

Pursuant to Rule 75-D of Rules of Civil Procedure, the appellants make the following concise statement of points upon which they intend to rely upon this appeal.

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company was a general Partner of Gerry Horton Farms, a partnership engaged in the raising of potatoes, though the evidence was insufficient to prove it was ever such a partner, and, on the contrary, established that it was not a partner.

II.

The Order, Judgment and Decree of the Court was erroneous in disallowing the major portion of such claim against Gerry Horton Company, a co-partnership, and in disallowing the said claim against Gerry Horton Farms, a partnership composed of Gerry Horton and J. D. [134] Althouse, and was erroneous in making any order respecting an allowance with respect to Gerry Horton Farms, a partnership decreed to be composed of Kaufman-Brown Potato Company and Gerry Horton Farms,

since Kaufman-Brown Potato Company was not a partner with Gerry Horton Farms in any partnership and such non-existent partnership was improperly adjudged to be a bankrupt.

III.

The findings of fact and conclusions of law upon which said Order, Judgment and Decree was based are not supported by and not justified by the evidence.

IV.

The Order, Judgment and Decree of the Court was erroneous in that it adopted the Order of the Referee as amended, the findings of fact and conclusions of law of the Referee as amended, and confirmed the same, though the errors herein complained of in respect to the Order of the Judge of the District Court exist and apply with equal force to the said Order, findings of fact and conclusions of law of the Referee as amended by the Court.

Respectfully submitted,

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

Affidavits of service by mail attached.

[Endorsed]: Filed Oct. 26, 1949. [135]

[Title of District Court and Cause.]

AMENDED STATEMENT OF POINTS UPON
WHICH APPELLANTS WILL RELY
UPON APPEAL FILED AUGUST 24, 1949

Pursuant to Rule 75-D of Rules of Civil Procedure, the appellants make the following concise statement of points upon which they intend to rely upon this appeal.

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms, a partnership engaged in the raising of potatoes, though the evidence was insufficient to prove it was ever such a partner and, on the contrary, established that it was not a partner.

II.

The Order, Judgment and Decree of the Court in adjudicating Gerry Horton Farms, a partnership engaged in the raising of potatoes, composed of Kaufman-Brown Potato Company, a co-partnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry [137] Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, bankrupt, was erroneous in that said Kaufman-Brown Potato Company was not a co-partner and there was no such partnership, and also in that neither the proceedings had nor the evidence adduced permitted or justified such Order.

III.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company, and the co-partners composing it, namely Charles H. Kaufman and Albert H. Brown, are liable for the payment of the debts and obligations of Gerry Horton Farms, a co-partnership, and the costs and expenses in the bankruptcy proceedings, since it should have decreed that said Kaufman-Brown Potato Company and its co-partners were not liable for the debts and expenses involved in such bankruptcy proceedings.

IV.

The Order, Judgment and Decree of the Court was erroneous in that Kaufman-Brown Potato Company, and the said co-partners composing it, did not consent to the adjudication in bankruptcy in this proceeding of any parties except Gerry Horton and J. D. Althouse, doing business as Gerry Horton Company, a co-partnership; Gerry Horton and J. D. Althouse, doing business as Gerry Horton Farms, a co-partnership; Gerry Horton, an individual, and J. D. Althouse, an individual, and did not consent or request that the Court administer any estates or the property of any estates other than the estates and the property of the above-named parties.

V.

The findings of fact and conclusions of law upon which said Order, Judgment and Decree is based are not supported and not justified by the evidence in the case.

VI.

The Order, Judgment and Decree of the Court and the findings of fact and conclusions of law upon which said Order, Judgment [138] and Decree is composed are erroneous, in that Kaufman-Brown Potato Company was not a co-partner with Gerry Horton Farms in any partnership; in that no such co-partnership was ever intended to be formed, or was formed between Gerry Horton Farms and Kaufman-Brown Potato Company; in that neither Kaufman-Brown Potato Company nor Charles H. Kaufman nor Albert H. Brown, its co-partners, consented to an adjudication in bankruptcy of any parties other than those adjudicated bankrupt in the original Order of adjudication, nor to an administration of the estates or property other than the estates and property of such parties; in that Kaufman-Brown Potato Company did no acts and participated in no acts set forth in said findings as done by Kaufman-Brown Potato Company in connection with Gerry Horton Farms, save and except things done by it pursuant to its agreement with Gerry Horton Farms, which things so done by it were not done as a partner of Gerry Horton Farms; in that no false representations were made to the Court respecting the status of Kaufman-Brown Potato Company, and in that Kaufman-Brown Potato Company was a creditor of Gerry Horton Farms, a partnership composed only of Gerry Horton and J. D. Althouse.

VII.

The Order, Judgment and Decree of the Court was erroneous in disallowing the major portion of such claim against Gerry Horton Company, a co-partnership, and in disallowing the said claim against Gerry Horton Farms, a partnership composed of Gerry Horton and J. D. Althouse, and was erroneous in making any order respecting an allowance with respect to Gerry Horton Farms, a partnership decreed to be composed of Kaufman-Brown Potato Company and Gerry Horton Farms, since Kaufman-Brown Potato Company was not a partner with Gerry Horton Farms in any partnership and such non-existent partnership was improperly adjudged to be a bankrupt.

VIII.

The Order, Judgment and Decree of the Court was erroneous [139] in that it adopted the Order of the referee as amended, the findings of fact and conclusions of law of the referee as amended, and approved and confirmed the same, though the errors herein complained of in respect to the Order of the Judge of the District Court exist and apply with equal force to the said Order, findings of fact and conclusions of law of the referee as amended by the Court.

Respectfully submitted,

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed Oct. 26, 1949. [140]

[Title of District Court and Cause.]

AMENDED STATEMENT OF POINTS UPON
WHICH APPELLANT WILL RELY UPON
APPEAL FROM JUDGMENT ENTERED
IN JUDGMENT BOOK 5, PAGE 258 (AP-
PEAL FROM ORDER RE ADJUDICATION
IN BANKRUPTCY)

Pursuant to Rule 75-d of Rules of Civil Procedure, the appellants make the following concise statement of points upon which they intend to rely upon this appeal.

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms, a partnership engaged in the raising of potatoes, though the evidence was insufficient to prove it was ever such a partner and, on the contrary, established that it was not a partner.

II.

The Order, Judgment and Decree of the Court in adjudicating Gerry Horton Farms, a partnership engaged in the raising of potatoes, composed of Kaufman-Brown Potato Company, a co-partnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, [142] a co-partnership composed of Gerry Horton and J. D. Althouse, bankrupt, was erroneous in that said Kaufman-Brown Potato Company was not a co-partner and there was no such partnership, and also

in that neither the proceedings had nor the evidence adduced permitted or justified such Order.

III.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company, and the co-partners composing it, namely, Charles H. Kaufman and Albert H. Brown, are liable for the payment of the debts and obligations of Gerry Horton Farms, a co-partnership, and the costs and expenses in the bankruptcy proceedings, since it should have decreed that said Kaufman-Brown Potato Company and its co-partners were not liable for the debts and expenses involved in such bankruptcy proceedings.

IV.

The Order, Judgment and Decree of the Court was erroneous in that Kaufman-Brown Potato Company, and the said co-partners composing it, did not consent to the adjudication in bankruptcy in this proceeding of any parties except Gerry Horton and J. D. Althouse, doing business as Gerry Horton Company, a co-partnership; Gerry Horton and J. D. Althouse doing business as Gerry Horton Farms, a co-partnership; Gerry Horton, an individual, and J. D. Althouse, an individual, and did not consent or request that the Court administer any estates or the property of any estates other than the estates and the property of the above-named parties.

V.

The findings of fact and conclusions of law upon which said Order, Judgment and Decree is based are not supported and not justified by the evidence in the case.

VI.

The Order, Judgment and Decree of the Court and the findings [143] of fact and conclusions of law upon which said Order, Judgment and Decree is composed are erroneous, in that Kaufman-Brown Potato Company was not a co-partner with Gerry Horton Farms in any partnership; in that no such co-partnership was ever intended to be formed, or was formed between Gerry Horton Farms and Kaufman-Brown Potato Company; in that neither Kaufman - Brown Potato Company nor Charles H. Kaufman nor Albert E. Brown, its co-partners, consented to an adjudication in bankruptcy of any parties other than those adjudicated bankrupt in the original Order of adjudication, nor to an administration of the estates or property other than the estates and property of such parties; in that Kaufman-Brown Potato Company did no acts and participated in no acts set forth in said findings as done by Kaufman-Brown Potato Company in connection with Gerry Horton Farms, save and except things done by it pursuant to its agreement with Gerry Horton Farms, which things so done by it were not done as a partner of Gerry Horton Farms; in that no false representations were made to the Court respecting the status of Kaufman-Brown

Potato Company, and in that Kaufman-Brown Potato Company was a creditor of Gerry Horton Farms, a partnership composed only of Gerry Horton and J. D. Althouse.

VII.

The Order, Judgment and Decree of the Court was erroneous in that it adopted the Order of the referee as amended, the findings of fact and conclusions of law of the referee as amended, and approved and confirmed the same, though the errors herein complained of in respect to the Order of the Judge of the District Court exist and apply with equal force to the said Order, findings of fact and conclusions of law of the referee as amended by the Court.

Respectfully submitted,

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed Oct. 26, 1949. [144]

[Title of District Court and Cause.]

Bakersfield, California, May 12-13, 1947

REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD AND TESTIMONY GIVEN

Hearing on Order to Show Cause directing Kaufman-Brown Potato Company, a copartnership, composed of Charles H. Kaufman and Albert

H. Brown, to appear before Waldo R. Bergman as Referee in Bankruptcy and Special Master; and continued hearing on objection filed by the Trustee to the claim of said Kaufman-Brown Potato Company.

Counsel Appearing:

For the Trustee:

Harvey, Johnston, Baker & Palmer
C. W. Johnston, Esq.

For the Respondents:

Kendall & Howell
Donald G. Kendall, Esq.

The Court: This is the time stipulated for hearing the order to show cause directing Kaufman-Brown Potato Company, copartners, composed of Charles H. Kaufman and Albert H. Brown, to appear before Waldo R. Bergman as Referee and Special Master, by virtue of an order signed by Judge Leon R. Yankowitz, dated November 15, 1946, which order was pursuant to a petition for an order to amend, modify and change the order of adjudication to include Charles H. Kaufman and Albert H. Brown, in which petition it is alleged they are partners. Now, is there anything else?

Mr. Johnston: Also, there was continued until this time the objection which was filed by the Trustee to the claim of Kaufman & Brown, a copartnership, filed against both the Farms and the Company.

The Court: That's right. It is also to hear the

matter of the objection to their claim, filed by the Trustee.

Mr. Johnston: It was heretofore agreed on that, and there is a stipulation on file, I think, whereby the continuance was agreed upon if we could take the deposition of or obtain the testimony of the bankrupt, Gerry Horton, at a later date, because of the fact that these matters were continued at various times to accommodate Mr. Kaufman and Mr. Brown.

The Court: There is a stipulation on file and also an order. [2*]

Mr. Johnston: Also on the order to show cause on the objection to the claim, proof would have to be introduced by Kaufman-Brown and the burden would be on them. On the matter that was referred to you as Special Master, of course in that particular case we should introduce our evidence first, but as I say, due to the fact this continuance had to be had, I won't be able to introduce all, and I will have to get my deposition afterwards.

Mr. Kendall: We will stipulate to that procedure.

Mr. Johnston: At this time I will introduce some of these exhibits for the purpose of the record. I suppose, Mr. Kendall, we can refer to these and they may be considered part of the record, as read in the record, without the necessity of reading them in. Do you want them marked, each one of them, as exhibits?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

The Court: Yes.

Mr. Kendall: Is the original agreement in the record?

Mr. Johnston: No; it hasn't been introduced. The pleadings admitted the two agreements?

Mr. Kendall: Yes.

The Court: I want the record to also show this was continued from this morning at 10 a.m., until 1:30 by stipulation.

Mr. Johnston: At this time I want to introduce in evidence Order Approving of Claims. It is dated January 10, [3] 1947, and marked filed by the Referee as 1/22/47, and, for the purpose of the record, that is introduced only for the purpose of approving the claim of R. E. Cady.

Mr. Kendall: R. E. Cady; and the amount?

Mr. Johnston: \$71.17.

Mr. Kendall: I understand you are introducing this as being a claim against the joint venture transaction of the potato farming venture?

Mr. Johnston: Yes.

Mr. Kendall: Does it state the nature of the obligation?

The Court: It is Order Approving Claim.

Mr. Johnston: It is Order Approving Claim. There is a whole bunch in there but I was introducing it for the purpose of approving the claim of R. E. Cady.

Mr. Kendall: This is subject to objection if it is intended to be introduced as a claim they would be responsible for. It doesn't prove this claim arose

out of this transaction. In admitting them in evidence we are not admitting then with any admission that it is arising out of this transaction. It is just an allowed claim in this bankruptcy.

Mr. Johnston: Yes.

The Court: Aren't those claims segregated?

Mr. Johnston: Yes; this is allowed against the farms company. They would be bound but it is also allowed against the farms company; they would be liable as against the farms [4] company.

Mr. Kendall: On this potato deal it would have to be proved by evidence.

The Court: It is against the farms company but hasn't been designated as having been particularly allowed against this transaction.

Mr. Johnston: At this time I want to introduce exhibit marked 2, Order Approving Account of Trustee, dated January 20, 1947, and filed on the same day.

Mr. Kendall: May I see that, please? What is that—First Account of Trustee?

Mr. Johnston: No; this is the order approving account.

Mr. Kendall: What account; the first?

Mr. Johnston: Yes. That is Exhibit 3. This is Order Approving Claims, and that is dated January 4, 1947, and that is introduced as to these two claims: Larkin & Morse, \$914.10; Gundlach Plumbing Company, \$80.06. Next, which I want marked No. 4—that is First Report and Account of Trustee and Petition for First Dividend.

Mr. Kendall: May I see that?

Mr. Johnston: Just a minute. It is marked "Filed November 29, 1946. (Handing document to counsel.) The next is "Order Approving Claims." That is dated November 19, 1946 and filed the same day. That is No. 5. It shows that the following were approved against Gerry Horton Farms, as [5] follows: Pacific Gas & Electric Company, \$2,946.52; King Lumber Company, \$364.16; Barnett Tire Company, \$224.32; Ace Tractor Company, \$212.87; Wasco Tractor Company, 81.02; Bakersfield Hardware, \$50.32; F. E. Peterson, \$122.23; Stroud-Seabrook, \$106.58. The next one here is—I want to call this No. 6.

Mr. Kendall: What is the amount of that claim?

Mr. Johnston: It is the claim of Wayne Long, as Trustee of Gerry Horton Company, against Gerry Horton Farms, \$38,770.24.

The Court: You want these offered in evidence as exhibits in this matter before the court?

Mr. Johnston: Yes. The next one I will mark and introduce is No. 7, and it is the creditor's claim filed by R. E. Cady.

Mr. Kendall: Another one?

Mr. Johnston: I have two for him.

Mr. Kendall: You are starting back at 1, then; when not make this 1-a?

Mr. Johnston: Let's call it a number in order, then—7.

The Court: That is for \$71.17?

Mr. Johnston: No; the claim is for considerable more than that, but you see, we had an order to

show cause and notice was given as to all claims to determine what were claims against the copartnership of the company and what were [6] claims against the copartnership of the Farms, and the Court determined that of the amount, the total amount of claim \$71.17 was against the Farms and the other was against the Company.

The Court: That's right.

Mr. Johnston: The next is the claim of Larkin & Morris.

The Court: That will be Exhibit No. 8.

Mr. Johnston: Yes; I want to introduce that in evidence. The next number is Bakersfield Hardware Company; that is a claim of \$50.32, No. 9.

The Court: Yes.

Mr. Johnston: Then here is the itemized statement. Can we mark that 9-a?

The Court: Yes.

Mr. Johnston: The next is 10 and 10-a; the claim of Wasco Hardware Company and the itemized statement of Wasco Hardware Company, respectively, the claim being for \$81.02.

Mr. Kendall: I notice on this \$81 claim an item of July 10, for forks of some kind. The potatoes were all up and going by then.

Mr. Johnston: I don't know whether they were or not. Some say they were and some say they weren't.

Mr. Kendall: As I understand it, there are being introduced anyway now; not for the purpose of proving them against Kaufman & Brown, but merely preliminarily, because there is no evidence against

Kaufman [7] & Brown at the present time. There is no showing that they were connected in any particular deal with Kaufman & Brown.

Mr. Johnston: They have been approved by the Court as a claim against the Farms Company in this amount.

Mr. Kendall: Then your purpose in introducing them is preliminary and you hope to tie them up, that they were in these deals in which Kaufman & Brown were involved?

Mr. Johnston: That's right. They were on the potato deal in the two pieces of land on which we claim Kaufman & Brown were in the partnership.

The next will be No. 11, which is the claim of Kern County Bank. There are two claims of the Kern County Bank, but this one is based upon a note in the original amount of \$12500, which is secured by a chattel mortgage. The next is Ace Tractor Company claim.

Mr. Kendall: Now, your Kern County Bank note: is there a balance on that note?

Mr. Johnston: It is introduced in there. You will have to get it out of there. It was allowed in the account. It is in the order and I will go back and pick it up and show you where it is. The next is No. 12, Ace Tractor Company. That is \$212.87, and the itemized statement marked 12-a.

The next is Barnett Tire Company. That is \$224.32. That would be No. 13. I haven't got the slips on some of these. [8]

The next is the Pacific Gas & Electric Company claim.

The Court: No. 14.

Mr. Johnston: And can we mark, 14-a, the itemized statement?

The Court: Yes.

Mr. Johnston: The next one is 15; Central Canal Company; that is \$583.40.

The Court: That will be No. 15.

Mr. Johnston: The next is King Lumber Company.

The Court: No. 16.

Mr. Johnston: And the itemized statement, there, marked No. 16-a.

The Court: Yes.

Mr. Johnston: And could we go back and mark the Barnett Tire Company—their itemized statement—13-a? Also, an order approving this Central Canal Company claim.

Mr. Kendall: I didn't hear all that.

Mr. Johnston: There was an order approving those claims. It has been introduced in evidence but I didn't read it off. All these claims were approved. The next is the Gundlach Plumbing Company for \$80.06. That is the claim that was filed. What is the number—17.

The Court: What about the itemized statement?

Mr. Johnston: It is on there. It is part of the claim.

The Court: It is part of the claim? [9]

Mr. Johnston: Yes. Some of these itemized

statements got loose.

Mr. Kendall: This is plumbing out at Horton's house. I do not understand how that figure has any business in there, by any stretch of the imagination, as a claim against Kaufman-Brown.

Mr. Johnston: You are making a statement that might not be correct.

Mr. Kendall: If you can prove it wasn't—but it says it was to his house.

Mr. Johnston: Next, I want to introduce claim filed by Stroud-Seabrook, \$106.58, marked 18, and the itemized statement marked 18-a. This one will be marked 19, the claim of F. E. Peterson for \$122.23, and the itemized statement.

The Court: 19-a.

Mr. Johnston: 19-a; yes. Now, I have been trying to find—I want the proof of mailing to creditors of the notice.

The Court: Can we go ahead with the rest of it?

Mr. Johnston: We will mark it "Exhibit No. 20," Notice to Creditors, and proof of mailing, of meeting of January 4, 1947.

Here is claim of Kern County Bank; it is Exhibit 11 that was introduced in evidence and it is Exhibit G that is attached to the account, and that shows that there is due the Kern County Bank \$2,154.35 by the Farms. [10]

The Court: Do you wish to introduce that in evidence at the present time?

Mr. Johnston: It has already been introduced.

Then, the claim of Central Canal Company is approved and is on the same page. That shows \$583.40.

The Court: What exhibit did we mark that?

Mr. Johnston: That was marked as Exhibit 11, but Exhibit 11 introduced in these proceedings is the First Account, and to the First Account is attached a list of all said creditors' claims; then the Court, by its order of January 20, 1947, which was introduced as Exhibit 2, approved those creditors' claims set forth in Exhibit G as far as the Farms are concerned. Do I make that clear now?

Mr. Kendall: Yes.

Mr. Johnston: I think that is all of these claims. That is all I have got. I am just introducing them so Mr. Kendall will know what creditors' claims are in there. Then, do you want to continue this until tomorrow?

Mr. Kendall: Yes.

The Court: Ten o'clock. This matter will be continued until tomorrow at 10 o'clock. [11]

Bakersfield, California, 10 A.M., May 13, 1947

Hearing before Waldo R. Bergman, as Referee in Bankruptcy and Special Master, continued from May 12, 1947, on Order to Show Cause directed to Kaufman-Brown Potato Company, dated November 15, 1946, signed by Judge Leon R. Yankowitz; the same parties being present.

The Court: This is the time set for the hearing.

Mr. Kendall: For the purpose of the record, Mr. Referee, Mr. Samuel C. Colby is here as my associate for the respondent Kaufman-Brown Company in this matter. Do you wish us to proceed?

Mr. Johnston: Yes. That was the agreement yesterday.

CHARLES H. KAUFMAN

having been first duly sworn to tell the truth, gave the following testimony:

Direct Examination

By Mr. Kendall:

Q. What is your full name?

A. Charles H. Kaufman.

Q. Where do you reside?

A. Chicago, Illinois.

Q. Are you a member of the Kaufman-Brown Company? A. That's right. [12]

Q. And what is that company—a partnership?

A. A partnership.

Q. Who are the partners?

A. Charles H. Kaufman and Albert H. Brown.

Q. Was that partnership in existence in the years 1943 and 1944? A. It was.

Q. At that time were the members of the partnership the same as you have just testified to?

A. They were.

Q. Are you personally acquainted with the bankrupt, Gerry Horton? A. I am.

Q. When did you first meet him?

(Testimony of Charles H. Kaufman.)

A. Oh, I have known Mr. Horton for approximately ten years.

Q. Prior to the year 1943, had you had any business dealings with him?

A. No, I did not.

Q. When did you have the first business dealings with Gerry Horton or the Gerry Horton Farms Company or Gerry Horton Company?

A. In 1943.

Q. In 1943? A. That's right.

Q. And what was the nature of that transaction?

A. Mr. Horton came to our offices in Chicago and asked us to finance a growing deal.

Q. Approximately what time of the year was this? A. In November. [13]

Q. Of what year? A. 1943.

Q. Just proceed.

A. And asked us to finance a growing deal on some land that he held the lease on at Shafter.

Q. Did Mr. Horton present any papers to you on that matter, or what transpired?

A. No, he didn't present any papers at that time; however, we did agree to——

Mr. Johnston: Just a minute. What was the conversation?

Mr. Kendall: Yes; that would be a conclusion. Just state what the conversation was; what he said and what you said, as well as you can remember?

(Testimony of Charles H. Kaufman.)

A. Mr. Horton asked us to finance a growing deal and we were to advance——

Mr. Johnston: Just a moment; not what they were going to; it is a question of this: what did you state you would do, in the conversation?

A. We stated that we would finance his growing deal at Shafter.

Mr. Kendall: That conversation was limited solely to a deal at Shafter?

A. That's right.

Q. Were any papers prepared on that deal?

A. They were at a later date.

Q. Was there any further conversation as to the details [14] of the financing, as to how it was to be handled, and so forth?

A. We were to put in the necessary amount of money to bring the crop up to harvest, and in return we were to receive a percentage of the deal, with the privilege of buying the potatoes at market price. In return, we were to be given a crop mortgage, as security.

Q. Did you receive any documents, then, from Mr. Horton?

A. We received this crop mortgage and a contract, I believe.

Mr. Kendall: And for the purpose of the record and to eliminate the introduction of additional exhibits, can we stipulate that the contract referred to is the contract which is set up in the pleadings

(Testimony of Charles H. Kaufman.)

as an exhibit and marked, which bears date the 16th day of November, 1943.

Mr. Johnston: That is the contract he is referring to?

Mr. Kendall: That is the one he is referring to now; that is the Shafter contract.

Mr. Johnston: Yes.

The Court: What is the exhibit number on that?

Mr. Kendall: It is Exhibit E in the petition. Then we would like to introduce as our exhibit the crop mortgage dated the 16th day of November, 1943, that went with that contract—that isn't an exhibit—which crop mortgage shows to be recorded in the office of the County Recorder of Kern County. [15]

Mr. Colby: Does that have an exhibit number?

Mr. Kendall: That is respondent's exhibit.

The Court: We have numbers here and we have letter exhibits. What shall we call this one?

Mr. Kendall: Let us have it marked Respondent's Exhibit A.

Q. (By Mr. Kendall): Who prepared the crop mortgage and agreement?

A. It was prepared by Mr. Horton's attorney.

Q. Was it mailed to you in Chicago, from California?

A. That's right; it was.

Q. You executed it in Chicago?

A. That's right.

Q. And returned the copy to Mr. Horton?

A. That is correct.

(Testimony of Charles H. Kaufman.)

Q. And sent the crop mortgage out for recording? A. That's right.

Q. Now, subsequent to the execution of these documents on November 16, 1943, did you make advances to Mr. Horton? A. I did.

Q. Now, after you had entered into this contract of November 16, 1943, did you enter into a subsequent contract with Mr. Horton? A. I did.

Q. And when I say "Mr. Horton," I refer to Gerry Horton and J. D. Althouse, doing business under the firm name and style of Gerry Horton Farms, which is the correct party to the [16] contract; and did you enter into a second contract with that party? A. I did.

Q. And was that on the 22nd day of January, 1944? A. It was.

Q. And that is the contract that is attached to the petition and marked "Exhibit D" in the petition? A. That's right.

Q. At the time of entering into that contract did you have any conversation with Mr. Horton?

A. Mr. Horton came to our office in Chicago and said that he and Mr. Althouse had secured a lease on three hundred and some odd acres of land at Arvin and asked us to finance the growing of this particular—

Mr. Johnston: I am going to object to this. The best evidence is the contract which is introduced in evidence. Any negotiation leading up to the con-

(Testimony of Charles H. Kaufman.)

tract would be all bound to the contract; anything said before that wouldn't be binding.

Mr. Kendall: This is preliminary. Anything with reference to the contract I think should be explained.

Mr. Colby: For the further reference, if I may be permitted to say; there is some question about the construction of this contract, that it may be ambiguous. If it is ambiguous then all testimony is permissible to establish the intent of the parties at the time.

The Court: Let it go ahead. [17]

A. (Continuing): Mr. Horton came into our office in Chicago and stated that the Gerry Horton Farms had a lease on 320 acres of land at Arvin and asked us to finance the growing of a potato crop on this particular land.

Q. (By Mr. Kendall): What terms were discussed for the financing?

A. We were to put up whatever moneys were necessary to bring this crop up to the time of harvest, and in return were to receive a percentage and also the privilege of buying these potatoes at prevailing market prices.

Q. The terms of that transaction were made the same as the prior transaction—the Shafter deal?

A. I believe there was a slight difference in the percentage.

The Court: In any event, whatever your con-

(Testimony of Charles H. Kaufman.)

versation was, it terminated in the execution of a written contract, which you have here?

The Witness: That's right.

Q. (By Mr. Kendall): And was that contract executed in the same manner as the other, by Mr. Horton mailing it to your office and you mailing it back? A. It was.

Q. At that time was it accompanied by a chattel mortgage, also? A. A crop mortgage. [18]

Q. And that crop mortgage is recorded here in Kern County? A. That's right.

Mr. Kendall: If your Honor please, I thought we had a copy of that here, but we do not have. The original of the other crop mortgage somebody stated was introduced here before.

The Court: I do not recall it.

Mr. Kendall: If not, I would like to introduce a photostat copy from the Recorder's Office, and I will get that.

Mr. Johnston: Do you have the book and page on that?

Mr. Kendall: No, I don't have. It was securing a note for \$19,250. I can get it by noon.

Q. (By Mr. Kendall): Subsequent to the execution of the second agreement and crop mortgage, did you make advances to him? A. We did.

Q. I will show you here checks of Kaufman-Brown Potato Company totaling \$42,594.82.

The Court: Are you going to offer those, Mr. Kendall?

(Testimony of Charles H. Kaufman.)

Mr. Kendall: Yes. Do you want them separate?

The Court: Well, I don't know.

Mr. Johnston: Maybe I can save you time. What is the purpose of this?

Mr. Kendall: We are showing the advances made. I am putting it in the proper order. Let us have them marked for identification and we will introduce them when we can tie them up with the evidence showing that is where the money went. We [19] can't put it all in at one time. I will have them marked as Respondent's "B"—one exhibit.

Mr. Johnston: For identification only?

Mr. Kendall: Yes; for identification only.

Q. (By Mr. Kendall): I will show you this group of checks marked "Respondent's Exhibit B for Identification" and ask you if you recognize those? A. I do.

Q. And those were drawn on Kaufman-Brown Company? A. Yes.

Q. And you signed them?

A. I signed some of these and some of them were signed by Mr. Brown.

Q. And what was the purpose of the checks?

Mr. Johnston: The checks speak for themselves and are the best evidence.

Mr. Kendall: We have some made to Western Union and signed by Mr. Kaufman. He can testify what he was doing with his money.

Mr. Johnston: Yes.

Q. (By Mr. Kendall): Take the first one, for

(Testimony of Charles H. Kaufman.)

\$5,000, payable to Western Union Telegraph Company, dated November 9, 1943?

A. Mr. Horton asked us to wire this money to his bank, as he needed funds immediately.

Q. Did you personally take the money to Western Union? [20]

A. Yes; I personally took the money to Western Union.

Q. For the purpose of wiring the money the check had to be made to Western Union?

A. That is correct.

Q. And the wire went to Gerry Horton Company here, or Gerry Horton?

A. The wire went to——

Mr. Johnston: The wire would be the best evidence.

The Court: Do we have it?

Mr. Kendall: Is there any objection, Mr. Johnston, that this money was not advanced? Did anybody make a contention that it wasn't advanced?

Mr. Johnston: I don't know.

Mr. Kendall: We state it was, and if nothing to the contrary—he certainly isn't going to take money down to the Western Union and give it to them.

Q. (By Mr. Kendall): Where did you direct the wire?

A. This money was wired to Gerry Horton Farms' bank at Oildale.

Q. The Kern County Bank at Oildale?

(Testimony of Charles H. Kaufman.)

A. That's right, for deposit to his account.

Q. On the second check that is made out to Halstead Exchange National Bank, in amount \$12,800?

A. This check was in payment of a draft drawn by Gerry Horton of the Gerry Horton Farms. [21]

Mr. Johnston: I don't have any objection.

Q. (By Mr. Kendall): These checks, reading from Exhibit "B"—the ones we have definite proof, and are acceptable here: January 4, 1944, \$10,000, which is a check and draft; January 22, 1944, \$6,074.82, represented by check of Kaufman-Brown Potato Company, paying a draft; February 2, 1944, \$3720, represented by check of Kaufman-Brown Potato Company, paying draft. We put on the testimony on the \$5,000 check; that is the one you personally took to Western Union, directed to Kern County Bank? A. That is right.

Q. We have check dated November 2, 1943, \$12,800, payable to Homestead Exchange National Bank, signed by A. H. Brown?

A. A. H. Brown?

Q. A. H. Brown is your partner?

A. That's right.

Q. Do you personally know anything about the disposal of that check?

A. That was in payment of a draft drawn by the Horton Farms.

Q. Now, we have the check, January 27, 1944, in the sum of \$5,000, to Western Union Telegraph Company, signed by A. H. Brown. Do you know

(Testimony of Charles H. Kaufman.)

anything about the disposal of the funds on that?

A. That was handled the same way as the other check made [22] out to Western Union; it was for funds wired to the bank for the credit of the account of Horton Farms. *

The Court: Were there two checks for \$5,000?

Mr. Kendall: There are two; one of them signed by C. H. Kaufman and dated November 9, 1943; the other dated January 27, 1944, signed by A. H. Brown, to Western Union.

Q. (By Mr. Kendall): Do you recall, Mr. Kaufman, when the crop was completed—the harvesting of the crop on the Arvin ranch?

A. The crop, the completion of it was somewhere in the first week of June.

Q. In other words, on or before the 8th of June it would have been completed? A. Yes.

Q. Some time during that week?

A. That's right.

Q. When did they complete the harvest on the Shafter ranch?

A. That was completed before the 4th of July.

Q. It was completed around the first few days of July? A. That's right.

Q. It was definitely completed before the 4th?

A. That's right.

Q. Throughout these two contracts regarding the Shafter potato deal and the Arvin potato deal, did you ever have any other business dealings with

(Testimony of Charles H. Kaufman.)

Gerry Horton individually, or Gerry Horton Farms, or J. D. Althouse, or Gerry Horton Company?

A. No; none. [23]

Q. These were the sole transactions?

A. That's right.

Q. Do you have any interest of any kind in the Gerry Horton Farms or Gerry Horton Company?

Mr. Johnston: Just a moment. That is incompetent, irrelevant and immaterial. The question as to what interest he might have under this contract would be for the court to decide.

Mr. Kendall: I mean outside of this.

The Court: Outside this contract?

Mr. Kendall: Yes. You see, in your citation you try to make him a general partner in this business, participating all the way through, not limiting it to these alleged contracts.

Mr. Johnston: That's right. All right; I have no objection.

Q. (By Mr. Kendall): Other than these contracts with Gerry Horton, did you ever have any other agreement of any kind regarding sharing crops or profits from crops, with Gerry Horton Company? A. None.

Q. Your sole transactions with Gerry Horton Company were limited to these contracts and crop mortgages securing them; is that correct?

A. That is correct.

Q. Did you ever talk to any creditors of Gerry Horton Company regarding arranging credit? [24]

(Testimony of Charles H. Kaufman.)

A. No, I did not.

Q. Did you ever talk to anyone in the Kern County Bank regarding credit for Gerry Horton or Gerry Horton Company? A. No.

Q. Did you ever talk to anyone at Pacific Gas & Electric Company regarding furnishing power for Gerry Horton? A. No.

Q. Now, the total amount of the advances, as shown by the checks we have testified to, has been totalized thereon to the sum of \$42,594.82. Does that represent all moneys that Kaufman-Brown Potato Company advanced to the Horton Company?

A. That's right.

Q. In addition to that sum wasn't there in fact an overdraft that was covered, in the sum of \$884.97?

A. Do you want the explanation of that \$884.97?

Mr. Kendall: Yes.

Mr. Johnston: That is a claim against Gerry Horton Company?

Mr. Kendall: Yes.

Mr. Johnston: They would be entitled to that because there is no claim they were interested in the company. On that particular one there is no objection. The other claims are on the farms. As far as any claim against the company—that partnership—I have to concede they would be entitled to that. No objection to that. [25]

Mr. Kendall: That overdraft of \$884.97?

Mr. Johnston: Whatever the check is.

(Testimony of Charles H. Kaufman.)

Mr. Kendall: But in your objection you include the total amount—the gross amount?

Mr. Johnston: In the objection; because he filed claim against both outfits. You are only entitled to as against one or the other. I have no objection to that claim against the Company.

Mr. Kendall: As against the Company we have but one claim; that is on this overdraft of Gerry Horton Company, \$884.97. The remainder of our claim arises from our financing of the Farms and is our claim against the Farms.

Mr. Johnston: No objection to that.

The Court: Did he file separate claims or single claims?

Mr. Kendall: Just a single claim.

The Court: Then the claim to be adjusted out would be less this overdraft—against the Company but not against the Farms.

Mr. Johnston: My objection to the claim is that it couldn't be allowed against both of them, if allowable at all, and if Mr. Kendall concedes that that amount on the overdraft for a check that is drawn on the Company is a claim only against the Company, they would be entitled to it as a claim against the Company.

Mr. Kendall: That is correct; we concede that. Then [26] the objections that are now going on are regarding a claim against the Farms which is in the amount of \$22,594.82 and is represented by checks all of which are dated July 12, 1944 and are in the following amounts—

Mr. Johnston: Now, Mr. Kendall, do you claim

(Testimony of Charles H. Kaufman.)

any amounts against the Farms excepting those checks?

Mr. Kendall: That is all.

Mr. Johnston: Then you don't have to prove the amounts because the checks speak for themselves. The objection is on the ground that when they are partners they wouldn't be entitled to prorate against other creditors. He doesn't have to prove his claim as to the amount. Those checks speak for themselves and were drawn on the Farms and sent to him and returned marked "Insufficient Funds."

Mr. Kendall: In other words, the amount of our claim is established and there is no objection. The only objection now is to proving the effect of our contractual relations with them.

Mr. Johnston: With them on this potato deal. Those checks, as I understand it, are the ones out on this potato deal.

Mr. Kendall: That's right. I will ask the question of Mr. Kaufman, to get it in the record:

Q. These checks returned "N.S.F." and attached as an exhibit to our claim are checks which were sent in payment [27] of the balance of your advances on the potatoes? A. That is correct.

Mr. Kendall: We have here, Mr. Referee and Mr. Johnston—I am offering here a series of checks running from No. 1592 to 1911, on the Kaufman-Brown Potato Company, made out to Gerry Horton Company, which I am asking to be marked at this time and identified as Respondent's Exhibit C—one exhibit.

(Testimony of Charles H. Kaufman.)

Mr. Johnston: My objection is, it is incompetent, irrelevant and immaterial, and not within the issues.

Mr. Kendall: These checks are offered for the purpose of showing payment to Gerry Horton Company of all moneys received from the sale of the potatoes under the two contracts between Gerry Horton Farms and Kaufman-Brown Potato Company. That is correct, isn't it, Mr. Kaufman?

A. That is right.

Q. These are checks paid to the Horton Company for the balance of the potatoes?

A. That's right.

Mr. Kendall: Whether they become material rests on as to whether you want to enforce that \$40,000 claim the Trustee alleges the Company has against the Farms; is that right?

The Court: I will take these for identification at this time and I will hold my ruling on the checks.

Q. (By Mr. Kendall): Who kept the books on the transactions, as far as the expenditures on the Farms were concerned? [28]

A. Gerry Horton.

Q. That is, there were no books kept at your end of the line on that transaction?

A. None at all.

Q. Did you consult with Gerry Horton regarding the financial outcome of the Arvin contract?

A. I did.

Q. And what was the conversation?

A. At the time, Mr. Horton stated that the rec-

(Testimony of Charles H. Kaufman.)

ords were not complete, but he was of the opinion that the Arvin deal would show a small loss.

Q. Did he give you any figures at that time?

A. At that time he said it may run into two or three thousand dollars.

Q. Did you have any conversation with Mr. Horton regarding the outcome of the Shafter deal?

A. I did.

Q. And what was that conversation?

A. Mr. Horton stated that in his opinion the Shafter deal would show a profit sufficient to overcome the deficit at Arvin.

Q. Mr. Horton had all the facts and figures before him at his office when he made those representations?

A. That's right; he did.

Q. And between the two deals, then, as far as he [29] represented to you, there was no loss?

A. That's right.

Q. And at that time he gave you the checks to repay the balance of your account?

A. That is correct.

Q. And those were the checks that were returned from the bank and upon which your claim is made?

A. That's right.

Mr. Kendall: That is all.

The Court: I wonder if you would recapitulate on these checks that represent your claim; why they were given and to adjust what figures?

Mr. Kendall: The checks attached to our claim

(Testimony of Charles H. Kaufman.)

are all dated July 12, 1944, and are given on the Gerry Horton Farms account with the exception of the one check which we have segregated heretofore. The total amount of those checks upon which we are basing our claim against the Farms is \$22,594.82, made up of the following checks to Kaufman-Brown Potato Company: \$7,594.82——

The Court: I will take the total, but may I ask whether or not these checks represent the difference in the advances pursuant to the terms of the contract?

Mr. Kendall: These checks represent the difference between the total amount of the advance and what had already been repaid as against what our claim now is. The total of [30] these checks plus what we had received back make the total amount of our advances. If these checks had cleared we would have no claim.

The Court: I see.

Mr. Johnston: What was the total amount of money you received back on your total advances?

Mr. Kendall: We received back \$20,000.

Mr. Johnston: That is, \$20,000 even?

Mr. Kendall: Yes.

Mr. Johnston: And the difference between \$20,000 and the total amount of your advances is represented by these checks upon which your claim is based?

Mr. Kendall: That's right.

(Testimony of Charles H. Kaufman.)

Mr. Johnston: Does that clear it up, Mr. Referee?

The Court: Yes.

Mr. Kendall: That is all.

Cross-Examination

By Mr. Johnston:

Q. These advances you made were made on the chattel mortgages?

A. These advances were made, that's right, on the chattel mortgages.

Q. And where are the notes that were given in connection with the two chattel mortgages?

A. I don't have the notes. [31]

Q. Those were returned, weren't they?

A. Returned to who?

Q. To Mr. Horton? A. I don't recall.

Mr. Kendall: I will stipulate that the checks on which our claim was based were accepted in payment of the mortgage. We are not making claim on the notes. We don't have a double claim here.

Q. (By Mr. Johnston): Did you buy all of the Arvin potatoes; that is, the potatoes that were grown on the Arvin farm?

A. Did we buy all of them?

Q. Yes. A. No, we did not.

Q. You bought a substantial portion of them, didn't you?

A. I don't recall what portion we bought.

Q. These checks you have introduced in evi-

(Testimony of Charles H. Kaufman.)

dence—have they covered the purchase of the potatoes you made from the company?

A. That's right.

Q. And those potatoes were all grown on the Arvin farm and Shafter farm?

A. That's right.

Q. And the \$20,000 you received in cash—which note did they apply that on; the Arvin note or the Shafter note?

A. That was applied on the indebtedness; that is, on the two of them combined.

Q. The \$20,000?

A. That's right. In other words, we consider the [32] entire amount as one deal, so far as the firm's indebtedness to us.

Q. You don't have the notes—but do you have a record showing your book records—how you applied that money?

A. All these advances were charged against the——

Q. I say, do you have a book record with you?

A. No, I do not.

Q. You do not have it with you? A. No.

Q. Do you have a record with you of the potatoes you received from the Arvin property?

A. We don't have those checks segregated. They are all together.

Q. You didn't understand my question. Do you have a record of the potatoes you received—the total amount of the potatoes you received?

(Testimony of Charles H. Kaufman.)

A. No, we do not.

Q. You don't have a record of the payments that you made for the potatoes that were shipped from the Arvin property? A. No.

Q. In other words, those checks you have introduced include all the checks you sent them on both the Shafter and the Arvin property?

A. That's right.

Q. Can you segregate those to show what was purchased from the Arvin property and what was purchased from the [33] Shafter property?

A. We did. All of these records were kept, but all the time in his office; that is, invoices were issued to us on all these particular cars; car numbers, I believe, were on each check; however, where those cars were shipped from—we do not have that record.

Mr. Kendall: You could check those from Horton's record.

Q. (By Mr. Johnston): Did Mr. Horton ever furnish you a statement to show the losses or profits that were made on this Arvin transaction?

A. He never furnished us with the bank statements, although he had promised repeatedly to do it.

Q. Did he ever furnish you a statement as to losses or profits on the Shafter transaction?

A. No, he did not.

Q. Do you have a California representative?

A. At that particular time?

Q. At any time?

(Testimony of Charles H. Kaufman.)

A. We have a buyer out here.

Q. Who is that—Mr. Bergovitz, or Mr. Bandovitz?

A. Mr. Bandovitz merely represented us at a few hearings because neither I or Mr. Brown were able to be here.

Q. In your answer you state that Gerry Horton—you deny that Gerry Horton has no assets other than exempt. What do you know about that?

A. I know nothing of Mr. Horton's finances.

Q. All right; do you know anything about Mr. J. D. Althouse's finances? A. I do not.

Q. Do you know anything about the assets of Gerry Horton Farms?

A. I know nothing of that.

Q. Do you know anything about the assets of Gerry Horton Company? A. No.

Q. Or the liabilities of any one of those?

A. I do not.

Q. Do you know anything about the liabilities that were incurred during the operations of raising potatoes on the Arvin property?

A. No, sir; I do not.

Q. Do you know anything about the liabilities that were incurred during the raising and growing of potatoes on the Shafter property?

A. I do not.

Q. You allege in your answer, further, that the Trustee neglected to take appropriate action to recover certain assets. You say there is a claim

(Testimony of Charles H. Kaufman.)

against Morris & Larkin for refund of rent. Do you know anything about that?

A. No, sir; I do not.

Q. Do you know anything about the alleged claim against Morris & Larkin for failure to furnish water?

A. No; I do not.

Q. Do you know anything about the alleged claim against the wife of J. D. Althouse for property that was transferred [35] from her to Althouse?

A. I do not.

Q. The only two partners in this partnership of Kaufman-Brown at the time this bankruptcy petition was filed, which was on or about the 5th of August, 1944, was yourself and the other co-partner?

A. That's right.

Q. And his name is what?

A. Albert H. Brown.

Q. What did your assets consist of at that time?

A. What did our assets?

Q. The partnership; not your individual; the partnership of Kaufman-Brown?

A. I don't know.

Q. Well, did the partnership of Kaufman-Brown have any assets at that time?

A. That's right; yes, sir.

Q. Do you know what they were?

A. Offhand, no.

Q. Did they have any liabilities?

A. I suppose all business has.

Mr. Colby: Just "yes" or "no."

(Testimony of Charles H. Kaufman.)

A. Yes.

Q. Do you know what their total liabilities were at that time? A. No, I do not.

Q. Did the partnership own any real property?

A. What? [36]

Q. Real property?

Mr. Colby: Real estate.

A. No.

Q. What did their assets consist of?

A. Accounts receivable; merchandise; equipment.

Q. Do you have any idea of whether your assets exceeded your liabilities or your liabilities exceeded your assets at that time?

A. Our assets exceeded our liabilities.

Q. According to your book value?

A. That is correct.

Q. By approximately how much?

A. I don't know.

Q. Have you got any idea?

Mr. Kendall: In other words, you are trying to obtain the net worth?

Mr. Johnston: I don't care about the net worth, but we are entitled to know whether they were solvent or insolvent.

The Witness: You are talking about the firm of Kaufman-Brown?

Mr. Johnston: Yes; not individually.

A. I would say approximately \$100,000.

Mr. Johnston: I think that is all.

Mr. Kendall: Mr. Colby wants to know about Horton's testimony. Have you made any move on that? [37]

Mr. Johnston: We are waiting until this is done.

The Court: What about the originals of the contracts? Do you want to offer them in evidence?

Mr. Kendall: The actual originals aren't in.

Mr. Colby: We should offer them. I have no objection, so let's put them in.

Mr. Kendall: Let's put them in.

Mr. Colby: I think we should erase the pencilled markings.

Mr. Johnston: If you erase them it goes up and somebody wants to know what they are erased for.

The Court: Exclusive of the markings.

Mr. Colby: Do they have the same number as "D" and "E"?

The Court: No; let us call them "Respondents"—well they just happen to be "D" and "E". We will call them "Respondent's".

Mr. Kendall: "D" will be the 22nd of January contract and "E" is the 16th of November contract. Then we still have that chattel mortgage to introduce, of which I will get a certified copy.

The Court: These are admitted as Respondent's "D" and "E".

RESPONDENTS' EXHIBIT D
AGREEMENT

This Agreement entered into this 22nd day of January, 1944 by and between Gerry Horton and J. D. Althouse, co-partners doing business under the firm name and style of Gerry Horton Farms, hereinafter referred to as First Parties, and Charles H. Kaufman and Albert H. Brown, doing business under the firm name and style of the Kaufman-Brown Potato Company, hereinafter referred to as the Second Parties.

Witnesseth:

Whereas, First Parties are the lessees of approximately one hundred ninety-two and one half ($192\frac{1}{2}$) acres of land situated in the County of Kern and more particularly described as follows:

Northeast Quarter ($NE\frac{1}{4}$) of Section Twenty-eight (28) and Northwest Quarter ($NW\frac{1}{4}$) of Section Twenty-Seven (27), both in Township Thirty-two (32) South, Range Twenty-nine (29) East, M.D.B.M. and containing One Hundred Ninety-two and one half acres ($192\frac{1}{2}$) more or less, upon which acreage First Parties are to plant, cultivate, raise and harvest a crop of potatoes; and

Whereas, First Parties are desirous of selling to Second Parties, and Second Parties are desirous of buying from First Parties an undivided 50% interest in and to the potato crop to be planted, raised and harvested upon the said acreage by First Parties;

Now, Therefore, It Is Hereby Agreed by and between the parties as follows:

1. First Parties hereby convey, bargain and sell to Second Parties an undivided 50% interest in and to all of the potato crops to be planted, raised and harvested upon the above described acreage during the year 1944.

2. Second Parties, in consideration therefor, agree to pay to the First Parties, a total sum of nineteen thousand two hundred fifty and no/100 dollars (\$19,250.00) on the basis of one hundred and no/100 dollars (\$100.00) per acre, said sum is hereby acknowledged by First Parties as having been paid in hand.

3. It is further agreed that any and all costs and expenditures incurred in raising and planting the potato crops on the above described acreage in excess of the sum of nineteen thousand two hundred fifty and no/100 dollars (\$19,250.00), which sum Second Parties have agreed to pay in the manner hereinabove set forth, shall be paid by First Parties. The costs incurred for harvesting said crops of potatoes shall be paid in the following basis:

Fifty per cent (50%) of the harvesting costs by First Parties and Fifty per cent (50%) of said harvesting costs by Second Parties.

4. The net proceeds or profits obtained from the sale of the potato crops are to be divided between the partners on the following basis:

Fifty per cent (50%) of the net proceeds to be paid to the First Parties and Fifty per cent (50%) of the net proceeds to be paid to the Second Parties, provided, however, that before a distribution of the net proceeds is made, Second Parties shall first be repaid the sum of nineteen thousand two hundred fifty and no/100 dollars (\$19,250.00), and after the repayment of said sum, First Parties are to be repaid any additional costs or advancements which they have incurred and paid, including the rent for said leased acreage, towards raising and planting said potato crops, over and above the sum of nineteen thousand two hundred fifty and no/100 dollars (\$19,250.00) paid by Second Parties to First Parties.

5. First Parties agree to maintain and keep full and accurate accounts of all transactions in proper books of account and shall enter or cause to be entered therein, a full and accurate account of all transactions entered into and made and of all expenditures incurred in the planting, raising, harvesting, etc., of the potato crops on the above described acreage.

(a) That the books of account and all other records to be kept by First Parties shall be kept in the place of business of First Parties at their office in the Sill Building, Bakersfield, California, and each of the parties hereto shall, at all times, have access to and may inspect and copy any of them.

6. First Parties warrant that the potato crops are free of any encumbrances or crop mortgages and agree to save Second Parties harmless from any crop mortgages or encumbrances on said potato crops.

7. It is mutually agreed by and between the parties hereto, that any losses that may be sustained in the planting, raising and harvesting of said potato crops, are to be assumed and borne as follows:

Fifty per cent (50%) of any losses to be assumed and paid by First Parties and Fifty per cent (50%) of any losses to be assumed and paid by Second Parties.

8. It is further provided that upon the harvesting of said potato crops Second Parties shall have the first right to purchase said potato crops, after same shall have been harvested, for a price equal to the prevailing market price for said potatoes; provided further, however, that in the event there is no prevailing market price for said potatoes upon harvest, Second Parties agree to handle said potatoes as agents for First Parties through the Terminal Market of Chicago, Illinois, and that Second Parties shall be entitled to charge the sum of ten cents (\$.10) per sack as commission for said services rendered on behalf of the partners hereto and agree to pay the money obtained from the sale of said potatoes through the Terminal Market of Chi-

cago, to the First Parties, subject to accounting and distribution as hereinbefore set forth.

In the event Second Parties exercise the right to purchase said potatoes, First Parties shall be entitled to add any markups permitted or allowed under and by virtue of any OPA regulations to the purchase price of said potatoes, and that the total amount of said mark-ups shall be divided between the parties hereto on the following basis:

Fifty per cent (50%) of the total amount of said mark-ups to First Parties and Fifty per cent (50%) of the total amount of said mark-ups to Second Parties.

9. First Parties agree to devote their best efforts towards raising, planting and harvesting said potato crops on the above-described acreage and to furnish any and all equipment that may be required.

10. First Parties agree to execute, concurrently with this agreement, as security for their faithful performance of this agreement, a crop mortgage covering the First Parties' interest in and to the above-described crops and further agree to execute a promissory note, made payable in favor of Second Parties, in the sum of nineteen thousand two hundred fifty and no/100 dollars (\$19,250.00).

11. A copy of said promissory note is set forth herein in words and figures as follows:

\$19,250.00

Bakersfield, Calif., Jan. 22, 1944

We promise to pay to the order of Charles H.

Kaufman and Albert H. Brown, doing business under the firm name and style of the Kaufman-Brown Potato Company, the sum of nineteen thousand two hundred fifty and no/100 dollars (\$19,250.00) on or before the 15th day of July, 1944 without interest.

This note is secured by a crop mortgage, and said note is subject to all the terms and provisions of that certain agreement executed the 22nd day of January, 1944, between mortgagors and mortgagees.

GERRY HORTON.

J. D. ALTHOUSE.

12. It is further provided that after the terms of this agreement have been fully complied with by First Parties and Second Parties herein that the Second Parties will surrender and cancel said crop mortgage and promissory note to First Parties. It is expressly understood that the crop mortgage and promissory note have been executed by the First Parties solely as security for the performance and conditions herein contained and for no other purpose and that the First Parties are not to be held liable to Second Parties for loss occasioned by inclement weather, acts of God, losses resulting from acts of war or loss resulting from causes which are beyond the control of First Parties.

13. In the event that any disagreements shall arise between the parties hereto in respect to any matter, cause or thing pertaining to said potato crops whatever, not herein otherwise provided for,

the same shall be decided and determined by arbitrators, and First Parties shall select one of such arbitrators, and Second Parties shall select one of such arbitrators, and both of such arbitrators shall select a third arbitrator, and the decision of two such arbitrators, when made in writing, shall be conclusive upon the parties hereto.

In Witness Whereof, the parties have hereunto set their hands the day and year first above written.

/s/ GERRY HORTON,

/s/ J. D. ALTHOUSE,

First Parties, d.b.a. Gerry
Horton Farms.

/s/ C. H. KAUFMAN,

/s/ A. H. BROWN,

Second Parties, d.b.a. Kauf-
man-Brown Potato Co.

RESPONDENTS' EXHIBIT E

AGREEMENT

This Agreement entered into this 16th day of November, 1943 by and between Gerry Horton and J. D. Althouse, co-partners doing business under the firm name and style of Gerry Horton Farms, hereinafter referred to as First Parties, and Charles H. Kaufman, and Albert H. Brown, doing business under the firm name and style of the Kaufman-Brown Potato Company, hereinafter referred to as Second Parties.

Witnesseth:

Whereas, First Parties are the lessees of approximately one hundred seventy-eight acres (178) of land situated in the County of Kern and more particularly described as follows:

All of the fractional Southwest Quarter (SW $\frac{1}{4}$) of Section Eighteen (18), Township Twenty-eight (28) South, Range Twenty-six (26) East, M.D.B.M., and containing one hundred eighty-six acres (186), more or less,

upon which acreage First Parties are to plant, cultivate, raise and harvest a crop of potatoes; and

Whereas, First Parties are desirous of selling to Second Parties, and Second Parties are desirous of buying from First Parties an undivided 40% interest in and to the potato crop to be planted, raised and harvested upon the said acreage by First Parties;

Now, Therefore, It Is Hereby Agreed by and between the parties as follows:

1. First Parties hereby convey, bargain and sell to Second Parties an undivided 40% interest in and to all of the potato crops to be planted, raised and harvested upon the above described acreage during the year 1944.

2. Second Parties, in consideration therefor, agree to pay to First Parties, a total sum of seventeen thousand eight hundred and no/100 dollars (\$17,800.00) on the basis of one hundred and no/100 dollars (\$100.00) per acre, said sum to be paid in

the following manner: First Parties hereby acknowledge receipt of the sum of five thousand and no/100 dollars (\$5,000.00) from said Second Parties, and the unpaid balance of the purchase price is to be paid upon execution of this agreement.

3. It is further agreed that any and all costs and expenditures incurred in raising and planting the potato crops on the above described acreage in excess of the sum of seventeen thousand eight hundred and no/100 dollars (\$17,800.00), which sum Second Parties have agree to pay in the manner hereinabove set forth, shall be paid by First Parties. The costs incurred for harvesting said crops of potatoes shall be paid on the following basis:

Sixty per cent (60%) of the harvesting costs by First Parties and Forty per cent (40%) of said harvesting costs by Second Parties.

4. The net proceeds or profits obtained from the sale of the potato crops are to be divided between the partners on the following basis:

Sixty per cent (60%) of the net proceeds to be paid to the First Parties and Forty per cent (40%) of the net proceeds to be paid to the Second Parties, provided, however, that before a distribution of the net proceeds is made, Second Parties shall first be repaid the sum of seventeen thousand eight hundred and no/100 dollars (\$17,800.00), and after the repayment of said sum, First Parties are to be repaid any additional costs or advancements which they have incurred and paid, including the rent for said

leased acreage, towards raising and planting said potato crops, over and above the sum of seventeen thousand eight hundred and no/100 dollars \$17,-800.00) paid by Second Parties to First Parties.

5. First Parties agree to maintain and keep full and accurate accounts of all transactions in proper books of account and shall enter or cause to be entered therein, a full and accurate account of all the transactions entered into and made and of all expenditures incurred in the planting, raising, harvesting, etc., of the potato crops on the above described acreage.

(a) That the books of account and all other records to be kept by First Parties shall be kept in the place of business of First Parties at their office in the Sill Building, Bakersfield, California, and each of the parties hereto shall, at all times, have access to and may inspect and copy any of them.

6. First Parties warrant that the potato crops are free of any encumbrances or crop mortgages and agree to save Second Parties harmless from any crop mortgages or encumbrances on said potato crops.

7. It is mutually agreed by and between the parties hereto, that any losses that may be sustained in the planting, raising and harvesting of said potato crops, are to be assumed and borne as follows:

Sixty per cent (60%) of any losses to be assumed and paid by First Parties and Forty per cent (40%)

of any losses to be assumed and paid by Second Parties.

8. It is further provided that upon the harvesting of said potato crops Second Parties shall have the first right to purchase said potato crops, after same shall have been harvested, for a price equal to the prevailing market price for said potatoes; provided further, however, that in the event there is no prevailing market price for said potatoes upon harvest, Second Parties agree to handle said potatoes as agents for First Parties through the Terminal Market of Chicago, Illinois, and that Second Parties shall be entitled to charge the sum of ten cents (\$.10) per sack as commission for said services rendered on behalf of the partners hereto and agree to pay the money obtained from the sale of said potatoes through the Terminal Market of Chicago, to the First Parties, subject to accounting and distribution as hereinbefore set forth.

In the event Second Parties exercise the right to purchase said potatoes, First Parties shall be entitled to add any mark-ups permitted or allowed under and by virtue of any OPA regulations to the purchase price of said potatoes, and that the total amount of said mark-ups shall be divided between the parties hereto on the following basis:

Sixty per cent (60%) of the total amount of said mark-ups to First Parties and Forty per cent (40%) of the total amount of said mark-ups to Second Parties.

9. First Parties agree to devote their best efforts

towards raising, planting and harvesting said potato crops on the above-described acreage and to furnish any and all equipment that may be required.

10. First Parties agree to execute, concurrently with this agreement, as security for their faithful performance of this agreement, a crop mortgage covering the First Parties' interest in and to the above-described crops and further agree to execute a promissory note, made payable in favor of Second Parties, in the sum of seventeen thousand eight hundred and no/100 (\$17,800.00) dollars.

11. A copy of said promissory note is set forth herein in words and figures as follows:

“\$17,800.00

Bakersfield, Calif., Nov. 12, 1943

We promise to pay to the order of Charles H. Kaufman and Albert H. Brown, doing business under the firm name and style of the Kaufman-Brown Potato Company, the sum of seventeen thousand eight hundred and no/100 (\$17,800.00) dollars on or before the 15th day of July, 1944 without interest.

This note is secured by a crop mortgage, and said note is subject to all the terms and provisions set forth and contained within that certain agreement executed the 16th day of November, 1943, between mortgagors and mortgagees.

GERRY HORTON.

J. D. ALTHOUSE.”

12. It is further provided that after the terms of this agreement have been fully complied with by

First Parties and Second Parties herein that the Second Parties will surrender and cancel said crop mortgage and promissory note to First Parties. It is expressly understood that the crop mortgage and promissory note have been executed by the First Parties solely as security for the performance and conditions herein contained and for no other purpose and that First Parties are not to be held liable to Second Parties for loss occasioned by inclement weather, acts of God, losses resulting from acts of war or loss resulting from causes which are beyond the control of First Parties.

13. In the event that any disagreements shall arise between the parties hereto in respect to any matter, cause or thing pertaining to said potato crops whatever, not herein otherwise provided for, the same shall be decided and determined by arbitrators, and First Parties shall select one of such arbitrators, and both of such arbitrators shall select a third arbitrator, and the decision of two of such arbitrators, when made in writing, shall be conclusive upon the parties hereto.

In Witness Whereof, the parties have hereunto set their hands the day and year first above written.

/s/ GERRY HORTON,

/s/ J. D. ALTHOUSE,

First Parties, d.b.a. Gerry
Horton Farms.

/s/ C. H. KAUFMAN,

/s/ A. H. BROWN,

Second Parties, d.b.a. Kauf-
man-Brown Potato Co.

Mr. Kendall: The evidence in this proceeding is taken before Mr. Bergman, both as Referee and as Special Master, and is admissible both in the proceeding regarding the adjudication of Kaufman-Brown Company and the objection to the claim of Kaufman-Brown Company. [38]

Mr. Johnston: That is correct.

Mr. Kendall: It is understood that the matter is held open, also, as far as respondents are concerned, for any rebuttal testimony we may admit after taking the deposition of Mr. Horton?

Mr. Johnston: You are entitled to disclose any new evidence. How are we going to fix the date on that?

Mr. Kendall: We will have to stipulate to a continuance for a date certain, and if not ready by that time, stipulate to another continuance; file them with the court and get orders on them.

The Court: We will adjourn until two o'clock.

Afternoon Session

This matter came on regularly, pursuant to adjournment, at the hour of 2 p.m., of the same day, the same parties being present, and the following proceedings were had:

Mr. Johnston: It is stipulated that the claim of the Central Canal Company that was introduced as Trustee's Exhibit No. 15, in the sum of \$583.40, and shows items incurred in May and June, was for water furnished on the Shafter property?

Mr. Kendall: That is correct. [39]

Mr. Johnston: Could we also mark this as "15-a"? I will mark it on there with a pencil.

Mr. Kendall: In stipulating to those facts we, of course, are not waiving our objection to the claim being immaterial, inasmuch as we maintain that it is a separate obligation of the Farms and not an obligation of the respondents here.

Mr. Johnston: Yes. When I was referring to the Shafter property I was referring to the properties on which there was an agreement.

Mr. Kendall: Yes.

Mr. Johnston: Then it is further stipulated that Exhibit 14-a of the Trustee, that the sum of \$1744.40 is for electrical power furnished by the Pacific Gas & Electric Company to the Farms?

Mr. Kendall: To Arvin.

Mr. Johnston: To the Arvin property; for the period April 7 to June 7, 1944, and that the service to the Shafter farm property consists of the sum of \$246.16, \$550.72, and \$13.81, up to June 8, 1944?

Mr. Kendall: That is correct.

Mr. Johnston: And that the amounts as follows: \$112.82, \$168.15, and \$11.55 were also furnished to the Shafter property, but were after June 8 and up to and including August 4, 1944? [40]

Mr. Kendall: That is correct; which of course is also subject to our same objection as made to the other claim.

Mr. Johnston: Yes; that you are not liable. Now, that is the only two we have this afternoon.

Mr. Kendall: There is one other thing: the claim

of F. E. Peterson, \$112.33, which was introduced as a part of Trustee's Exhibit 5, isn't within the period of the Arvin transaction and also, on behalf of F. E. Peterson, whom we also represent, we wish that claim withdrawn as a claim against the Kaufman-Brown Company.

Mr. Johnston: We have no objection to Mr. Kendall's—he represents Mr. Peterson and if he wants to withdraw it, regardless of what the facts are, he can withdraw it.

The Court: That is only withdrawn as to any claim against Kaufman-Brown?

Mr. Kendall: That's right.

The Court: In the event there is any liability.

Mr. Kendall: Oh, I want that clearly understood: it isn't withdrawn against Gerry Horton Farms Company; they owe the claim; just that there is no claim against Kaufman-Brown Company.

The Court: This will be continued until September 13, on a Saturday. Is that all right?

Mr. Johnston: Yes.

Mr. Kendall: Yes. [41]

State of California,
County of Kern—ss.

I, Geraldine Hall, hereby certify: that I am an official phonographic reporter of the Superior Court of the State of California, in and for the County of Kern; that I was duly sworn by the Referee in

Bankruptcy to serve as reporter in the District Court of the United States, for the Southern Division of California, Northern Division, for the purpose of the hearing in the matter as entitled on the first page of the foregoing transcript; that I did thereafter report said hearing in shorthand and subsequently transcribed the same into typewriting; that the foregoing and annexed forty-one pages, comprising said transcript, contain a full, true, and correct transcript of my shorthand notes so taken.

Dated: Bakersfield, California, July 25, 1947.

/s/ GERALDINE HALL.

[Endorsed]: Filed July 22, 1948.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Hearing on Petition for Order Amending, Modifying and Changing Order of Adjudication, Held before Waldo R. Bergman, as Special Master, and Hearings upon the Objections of the Trustee to the Claim of Kaufman-Brown, held before Waldo Bergman as Referee in Bankruptcy, in the Office of the Referee, Morgan Building, Bakersfield, California, on Friday, March 21, 1947, at 10:00 a.m.

Counsel Appearing:

For the Trustee:

HARVEY, JOHNSTON, BAKER &
PALMER

C. W. JOHNSTON, ESQ.

For the Bankrupts:

KENDALL, HOWELL & DEADRICH
DONALD G. KENDALL, ESQ.

The hearing on Petition for Order Amending, Modifying, and Changing Order of Adjudication filed in the above entitled matter by the Trustee in Bankruptcy came on regularly before Waldo R. Bergman, as Special Master, at his office in the Morgan Building, Bakersfield, California, on Friday, March 21, 1947, at 10 a.m., of said day, and hearing upon the objections of the Trustee to the Claim of Kaufman-Brown came on before the said Waldo Bergman, as Referee in Bankruptcy, at the same time. Thereafter the following proceedings were had and testimony given, to-wit:

Mr. Kendall: At this time I wish to state, Mr. Referee, that Mr. Banowitz, for whom we have been continuing this matter from time to time, and who advised us that he wished to testify in this proceeding, advised us yesterday that he wasn't coming up and that he felt he did not want to testify now. This was a surprise to both Mr. Howell and myself as we have in good faith from time to time requested continuances while he was ill, which the Court was courteous enough to grant us, and now, after all, he says he doesn't think he has any information he

can help us with. He did request, however, that we take the deposition of Mr. Charley Kaufman and Mr. Brown in Chicago. I personally don't know what they can testify to, never having been able to talk to them personally on the matter. It appears, however, that from talking to Mr. Banowitz that there may have been a new agreement [2*] after the execution of the other agreement, and the matter executed and handled.

The Referee: He should be here and testify on any new agreement. This is a Special Master's Proceeding which has been referred to me for the specific purpose of hearing the matters regarding this partnership arrangement between Kaufman-Brown and the bankrupt, and Mr. Banowitz has been here during the proceedings many times and although he has never testified as a witness and hasn't been sworn in as a witness, to my recollection, this is the time set for him to testify in this matter if he has anything to say regarding this partnership matter. Now, this has been continued at least ten times for him to come. At first it was decided by your office that the witnesses back in Chicago were the proper ones; subsequently you decided that they knew nothing about it, that Mr. Banowitz would be the one to testify, and then Trustee's counsel made arrangements for Mr. Banowitz to come here and be heard in this matter. Now, he was in the hospital and you and your partner, Mr. Howell, have requested continuances on the grounds that he was

* Page numbering appearing at bottom of page of original Reporter's Transcript.

unable to be here and he was given every opportunity to be here. You are not asking for a continuance, are you, Mr. Kendall?

Mr. Kendall: No, I can't ask for a continuance. The only thing I could ask at this time would be to have the matter submitted, subject to the submitting of the depositions [3] of Mr. Brown and Mr. Kaufman, and Mr. Johnston and I could get together on the subject of those depositions.

The Referee: Will you make a stipulation to that effect?

Mr. Johnston: I have some evidence to introduce.

Mr. Kendall: You go right ahead and introduce your evidence today.

Mr. Johnston: I also have to make arrangements with the bankrupt to be present. I have made arrangements with the bankrupt to make another trip out here, but on these continuances I couldn't do anything. I don't want ever to preclude somebody from testifying if they want to testify in a particular case. If I understand you, at first the two partners from Chicago were going to be present—I think that is what Mr. Kendall told me. It was continued for them to come. Then it developed that they didn't want to testify; that they didn't know anything about it; that only their agent Mr. Banowitz knew anything about it. I am willing to enter into a stipulation allowing them to take the testimony on oral deposition, and I will go back there and be present, with the understanding that both these people, the bankrupts, will answer all questions being propounded to them regarding the whole

transaction and regarding whether they were insolvent or solvent as far as their partnership was concerned, and themselves individually at the time this petition was filed, but I don't want to be in the position of having gone back there or having some attorney back there hired to take it and then the two people appear and refuse to testify.

Mr. Kendall: I will have it understood that they will testify and answer all questions concerning this transaction, or else the matter can be submitted without any depositions.

Mr. Johnston: They will answer all questions because this is a matter of having the partners adjudicated and themselves individually. We are entitled to know if they were insolvent or solvent at that time. If they are solvent they shouldn't be made bankrupts; if they are insolvent then they should be made bankrupts.

Mr. Kendall: Your position is, Mr. Johnston, that they are partners only in so far as this crop deal is concerned.

Mr. Johnston: As far as these contracts, they were in partnership on that.

Mr. Kendall: On the general farming crop, no; they were general farming partners as far as potatoes were concerned; yes. I do not think they were liable for the planting of the tomatoes, or for any brokerage transactions that the other company had. I won't admit legal liability under those contracts. I will state they executed the contracts and whatever the Court determines is their position, that is their

position under these contracts.

Mr. Johnston: When would you like to get these depositions? [5]

Mr. Kendall: I would like to get them as soon as possible. I would like to dispatch an airmail letter to Mr. Kaufman and have him communicate with me and talk to me not later than Monday and find out if he wants me to come back, or have a counsel there. Who can we take it before?

The Referee: You can take it before a referee.

Mr. Kendall: As soon as possible.

Mr. Johnston: I would say this: we can take it before a referee or a notary that any referee back there might designate. The referee might be busy in court or some other matters and couldn't hear it.

The Referee: You can make arrangements with a referee for a specific date that it may be heard. It might be well to have a Special Master's proceeding back there on this phase of it.

Mr. Johnston: I don't think it will be necessary to have a Special Master's proceeding. We can take depositions and have them referred back here. I think we can have the referee find a notary back there before whom the depositions can be taken and have subpoenas issued. I think that is all that is necessary.

Mr. Kendall: The referee himself wouldn't have to set on the matter.

Mr. Johnston: We could get a special order from the [6] Referee here. I presume, Mr. Kendall, those

depositions will be paid for by your clients and we can get a copy and pay for that?

Mr. Kendall: That is correct.

Mr. Johnston: But when those are complete I want a stipulation to take the deposition of the bankrupt who is in Kansas City.

Mr. Kendall: I would be willing to stipulate that should anything arise from the taking of those depositions requiring further testimony of the bankrupt, it can be taken in Kansas City.

Mr. Johnston: The bankrupt testified here some time before Christmas.

Mr. Kendall: We requested a copy of those proceedings and was informed no transcript had been taken.

Mr. Johnston: I think a reporter was here. I may be wrong.

The Referee: Mr. Howell was here, wasn't he?

Mr. Kendall: Yes; and he stated to me there was no report taken of the proceedings.

Mr. Johnston: I will say this: I have to have one of the bankrupts in court to finish up this testimony or take their deposition, and if I go back to take the depositions in Chicago I don't want to go to the expense of bringing the bankrupt out here when I am back there only a short distance [7] away and the deposition can be taken.

Mr. Kendall: Probably we can arrange it at the same time.

Mr. Johnston: Is that agreeable to you?

Mr. Kendall: That is agreeable; yes.

Mr. Johnston: When can this meeting be continued to, to give Mr. Kendall a chance—with this understanding: if you don't make arrangements with your clients so they are agreeable to going ahead with the deposition, my agreement to take the deposition of Mr. Horton will still be good to take that back there if he isn't available to come to Bakersfield.

Mr. Kendall: I might state this: that Mr. Banowitz has been more or less of a third party in the proceedings. He didn't negotiate the original transaction and apparently it turns out at the last minute that everything he knows about the deal is hearsay, from conversations with different people. Therefore, his testimony would not be of any value to us, although he kept calling and telling us he knew this and that and would send us papers which would show certain situations; we never got any of that and yesterday he refused to come up here. I want to give you the whole thing. So, now it has put us in the position of dealing directly with the Kaufman-Brown people and getting their reply. Now, if they say submit it as is, then I am willing to do so. If they want to go ahead and take these depositions, I am [8] going to have a transcript of this written up and send it back, so they can show it to their attorneys and they can see the exact picture and then advise me what they want to do. It shouldn't take a week, if it goes air mail, and they advise me promptly; then we can get the name of the referee. I guess Mr. Bergman can give us the

name of the referee.

The Referee: I thought you were going to use a notary.

Mr. Kendall: Or a notary, either one—and arrange a date for the deposition.

Mr. Johnston: But you did not answer my question. I said that regardless of whether they testify or not, I want a stipulation from you that I can take the deposition without me having to take the trouble——

Mr. Kendall: (Interrupting) I thought I had already granted that to you.

Mr. Johnston: All right. So that we don't lose the record on this, we ought to continue it until a certain time.

Mr. Kendall: I think we ought to have it wound up within thirty days.

Mr. Johnston: I want to continue this for a definite time within the next week or ten days, so you can report to the Court what your clients are going to do. If your clients are not going to testify then we can continue it to another date so see if I can get Mr. Horton here to testify.

Mr. Kendall: That is agreeable. You can set it up [9] ten days. But I wanted a copy of this so we can show them what position we have been put in here because neither Mr. Banowitz will testify or will they testify, so in order to present this to them I want to show them the record and say, "Here is the record; you can examine it and let me know what you can testify to." I think ten days would be enough.

Mr. Johnson: Then may it be continued for ten days so that Mr. Kendall can notify the Court definitely whether he wants to take the deposition of his clients Mr. Kaufman and Mr. Brown?

The Court: Yes; then ten days from now will be the 31st of March. We will continue the meeting to that time to hear from Mr. Kendall regarding these depositions.

State of California,
County of Kern—ss.

I, Geraldine Hall, hereby certify: that I am an official phonographic reporter of the Superior Court of the State of California, in and for the County of Kern; that I was duly sworn to act as shorthand reporter for the purpose of the hearing as entitled on the first page hereof; that thereafter I reported in shorthand writing the proceedings had and testimony given at said hearing, and thereafter transcribed the same into typewriting; that the foregoing and annexed ten pages contain a full, true and correct statement of the proceedings had and the testimony taken at the hearing of said matter and a full, true, and correct transcript of my shorthand notes taken of the proceedings had and testimony given thereat.

Dated: Bakersfield, California; March 24, 1947.
/s/ GERALDINE HALL.

[Endorsed]: Filed July 22, 1948.

REPORTER'S TRANSCRIPT OF
TESTIMONY OF GERRY HORTON

Appearances:

For the Trustee, Wayne Long:

HARVEY, JOHNSTON, BAKER
AND PALMER.
C. W. JOHNSTON.

For the Kaufman & Brown Potato Co.:

KENDALL & HOWELL.
DONALD G. KENDALL.
SAMUEL C. COLBY.

Bakersfield, California, December 8, 1947.
1:30 P. M.

Mr. McGugin: I think if we would have some kind of statement as to the issues involved.

Mr. Johnston: There are two matters before the Court. One is on an order to show cause against the claim of Kaufman-Brown which was filed—I don't know what their claim was, twenty some odd thousand, I think, and that is based on the fact it cannot be told from the claim whether the claim is against the Company—see, there is two partnerships here—whether it is against the partnership known as the Company, or the partnership known as the Farm. And, then, it is also objected to on the grounds if it is against the Farm that it is not allowable as a claim against the Farm until all the other creditors have been paid. And I might state at the hearing—

Mr. Kendall: That doesn't seem to appear, Mr. Johnston, on the order to show cause.

Mr. Johnston: I might state: at the hearing that was had here, at that time the transcript shows that it was agreed—if I can find it in the transcript—it is on page 26 of the transcript—shows that Mr. Kendall states their claim, as against the Gerry Horton Company, is \$884.97. "The remainder of our claim arises from our financing of the Farm and is against the Farm." So anything on the other claim,— [2*]

Mr. McGugin: How much was that, again, \$826.00?

Mr. Kendall: It is on page 26.

Mr. Johnston: It is against the Farms, \$884.97. Now, I have no objection to that amount being allowed against—not the Farm, but the Company. As against the Company, there is no objection to that being allowed. It was attached to their claim, and it shows that amount, and Mr. Kendall at that time stated there wasn't any other thing claimed against the Company on that claim.

Mr. McGugin: The attorney on the end; it is Mr. Kendall?

Mr. Johnston: That is at page 26. Now, the other is a matter here, it is a petition for an order amending and modifying the order of adjudication. There was three creditors signed a bankruptcy petition against the Gerry Horton Farms and the Gerry Horton Company. One of the creditors was the firm

* Page numbering appearing at top of page of original Reporter's Transcript.

of Kaufman & Brown. And we allege in our petition that they, at that time, were interested as partners, joint venturers; I don't know what charge it is; I haven't read the pleadings, now, but they were interested as partners, as joint venturers with Gerry Horton Company and Gerry Horton Farms, and that is in the complaint; that is, the Farms——

Mr. McGugin: That is the Gerry Horton Farms?

Mr. Johnston: That is the Gerry Horton Farms.

Mr. McGugin: And what is the name of the Company?

Mr. Johnston: Kaufman & Brown. [3]

Mr. Johnston: Now, there is introduced in evidence here—here is your exhibits that were introduced, and these, evidently, these two exhibits, were introduced by Mr. Colby as their exhibits; these are the original agreements; they are attached to the pleadings.

Mr. McGugin: The partnership?

Mr. Johnston: I think they dispute the question on the partnership. And we made these agreements, partnership agreements.

Mr. Kendall: To make the issue clear: we admit it is a straight financing deal, and they are not partners.

Mr. McGugin: And you represent?

Mr. Kendall: Kaufman & Brown. And the Trustee is maintaining we are partners and, therefore, liable for certain of the obligations in connection with the potato crops.

Mr. Johnston: Now, after the Trustee was appointed, these questions during certain hearings de-

veloped, and then the Referee asked Mr. Kendall if he was also representing the Trustee, and he discovered these facts and had to withdraw as attorney for the Trustee, as I say, as no criticism on Mr. Kendall; it was one of those things,—

Mr. Kendall: It was an apparent conflict of interests.

Mr. Johnston: —it develops. But our contention is this: Kaufman & Brown perpetrated a fraud on the Court; they knew at that time the existence of the contracts. If you look at the [4] contracts, it refers to them at certain places, in two particular places, maybe more, as partners. I don't think it is a contract alone for financing, as Mr. Kendall says, because, if you eventually read the contract, you will find out they sold a half interest in the potato crop to them under the contract.

Mr. McGugin: That is in, already in evidence?

Mr. Johnston: That is in, already in evidence. And, now, what we have asked for is the determination that Kaufman & Brown are partners in this joint venture for the purpose, only, of raising these potatoes according to the contract. There are other matters that this Farm Company had afterwards, or before, has nothing to do. Is that right, Mr. Colby? The question in dispute is upon the raising of the potatoes. Then, as I remember the record, why, we had a hearing before Referee Bergman on this matter, and there was certain testimony to him of Mr. Kaufman, I believe. Was it Mr. Kaufman?

Mr. Kendall: Yes.

Mr. Johnston: Then it was continued for Mr. Horton to appear, and it has been continued for various times. Now, Mr. Bergman was appointed as a Special Master to hear this, and there is a stipulation on file by counsel that all that evidence that was introduced in evidence heretofore by Mr. Bergman in the transaction can be considered by your Honor the same as if given before you.

Mr. McGugin: I believe, if I remember, there is a written [5] stipulation in the file to that effect.

Mr. Johnston: Yes, that is on file. Now, their answer here: they admit the qualifications of the Trustee, and they admit that the adjudication of these parties—and these contracts, they admit the contracts that have been introduced in evidence. But in substance they deny that these are partnership contracts. And they deny that there is any liability so far as they are concerned. Is that about the gist of the answer, Mr. Colby?

Mr. Colby: Now, may it please the Court, in order that your Honor may have a more specific view of the contention of these creditors, if your Honor has read these contracts—has your Honor read these?

Mr. McGugin: No, I haven't read the contracts. I have read the file but not the contracts.

Mr. Colby: Let me point out a few items in the contract.

Mr. Johnston: Mr. Colby, here is the thing: if you argue on the contract, we will not get through this afternoon. Can't we file briefs?

Mr. Colby: I am not arguing about the contract. Both contracts are almost verbatim alike, except the description of the premises, the date, and the amount; otherwise, they are word for word the same. One contract is dated November 16, 1943, and the other contract is dated January 22, 1944. Now, the purpose of the contract—I am only going to touch the [6] high lights—to start out with, this Horton and his partner, Althouse, sells to Kaufman & Brown Potato Company a half interest in a certain crop of potatoes to be grown; that is No. 1. Paragraph I of the contract states this sale in terms of a transfer; in other words, “the parties hereby convey.” The second paragraph recites the consideration, \$100.00 an acre, 160 acres. The third paragraph provides that in case the cost to the Gerry Horton Farms Company is in excess of this \$16,000.00, that excess is to be borne by the Gerry Horton Company. Paragraph IV—and here is where our dispute arises—is a contention of this creditor here, Kaufman & Brown Potato Company, that the word “partner” that appears in this Paragraph IV of both contracts is a clerical misprint and what was intended by the parties was the word “parties,” p-a-r-t-i-e-s, because all, throughout the contract they use the word “parties,” except in this instance and not another. I will call your attention, they use the word—all of a sudden the word “partners” appear. All right, I will skip Paragraph V, Books of Account. Paragraph VI is interesting, your Honor.

Mr. Johnston: Now, Mr. Colby, I don't object to this, but we are never going to get through if——

Mr. Colby: Let me have a minute. I didn't interrupt you. Bear with me, please. Two more points. Call your attention to Paragraph VIII. I want you to particularly, your Honor, to read that and digest it. There is a new situation entered [7] there. There, the bankrupt appoints the creditor or the other party to the contract as his agent to sell these potatoes when they are grown and raised, a new relation. Because your Honor well knows if you and I are partners one partner does not appoint another partner as agent. I am just calling that to your attention so your Honor will be governed when this evidence comes in. No. IX of the contract is interesting. There, the seller, which is the Gerry Horton Farms, agrees to the full terms of this potato crop; nothing mentioned about the buyer. No. X, to my way of thinking, your Honor, is the most important given to the interpretation; and your Honor called upon to interpret this contract, to decide whether this is a contract to finance a potato crop, or is this a partnership agreement making the partners liable for the debts. Paragraph X is a little unusual. And here is what these parties do and which bears out our contention it was a financing agreement: Section X provides that the seller shall give to the buyer, as security for this advance of \$16,000.00, a promissory note secured by a chattel mortgage on the crop to be grown. This chattel mortgage was duly recorded and is on file

in this file as an exhibit. Now, I will ask your Honor: Has it ever been heard of in the annals of law that one partner gives another partner a chattel mortgage. And, your Honor, if this were a partnership, the man would be taking a chattel mortgage on his own property. Therefore, with these ten points in mind and [8] listening to the testimony, I am not going to ask your Honor to decide, because your Honor won't, but have these ten points in mind when this testimony develops and your Honor is called upon to decide is this a partnership agreement or financing agreement.

Mr. Johnston: I thought you wanted to state the question instead of arguing on the question. Mr. Colby cleverly pointed out some things in the contract that is in favor of his client. But in one or two instances he hasn't given the Court fully all the information on it. For instance, he says, in Paragraph III, "All the cost shall be borne by Gerry Horton." That is not what it says. "The cost for harvesting said crop of potatoes shall be paid on the following basis:" It then goes, "Fifty per cent of the harvest cost by the first parties and fifty per cent of the harvest cost by the second party." And then it goes down in the next paragraph and says, "The net proportion of the profits of the sale of the potatoes is to be divided by the parties on the following basis:" And it says how it is to be divided. And then before Paragraph X, the last part of VIII, it says the losses—I think that is the one that says losses.

Mr. Colby: No. "Losses—Paragraph VII."

Mr. Johnston: Paragraph VII is the one that provides that the losses are to be paid fifty per cent by each of the parties involved. I don't want to point it all out, but I am [9] saying that you can't go by one thing. And I think that is something for us to do, is argue it afterwards, after we get this evidence in.

Q. (By Mr. Johnston): Have you been sworn?

The Witness: No.

Mr. Kendall: He testified before in the proceedings.

GERRY HORTON

called as a witness on behalf of the Trustee and being first duly sworn, testified as follows:

Direct Examination

By Mr. Johnston:

Q. Now, Mr. Horton, I had you check over the claims in the Gerry Horton bankruptcy matter yesterday with reference to claims that were against the Farm partnership, did I not? A. Yes.

Q. And on the claim of F. W. Frank, you found out that that claim was not against the potato deal?

A. That is correct.

Q. I am going to save time here, and whenever I refer to "the potato deal," it is in connection with this.

Mr. McGugin: So Kaufman & Brown would have no liability on that.

Mr. Johnston: I will give you that so you can

(Testimony of Gerry Horton.)

mark them down and eliminate it. (Hands paper to the Referee.)

Q. (By Mr. Johnston): Then on—I will give you something here—you checked the files and—I was talking to the [10] Court—in checking the files there, I notice that the claim of Irving Williams, an order was erroneously made out, and Mr. Calvin Conron represents the creditor, and there was an error in the amount of \$72.00; it is 768.65. It has no bearing on this Kaufman-Brown at all, but I would like that order to be signed, then that will straighten up the clerical error.

Mr. Kendall: That is not against the potato deal; is it?

Mr. Johnston: I am going to ask him.

Q. (By Mr. Johnston): The Irving Williams claim is not against the potato deal?

Mr. McGugin: Did I sign this order?

Mr. Kendall: No, Bergman signed the order. But I had an order against those people to see what it was, and the order drawn up recites \$72.00. We have noticed two amounts in their claim.

Mr. Johnston: It should be 768.65 instead of \$72.00; that is the correct amount. I checked it yesterday; I found it out.

Q. (By Mr. Johnston): This is the claim of Gundlach Sheet Metal. That was a claim for work on a house out here, and not on the potato deal. Is that correct? A. That is right.

(Testimony of Gerry Horton.)

Q. Now, the claim of R. E. Cady. You checked that, and that claim——

Mr. Johnston: I am asking him leading questions here. [11]

Mr. Kendall: Go ahead.

Mr. Colby: Go ahead.

Q. (By Mr. Johnston): That claim was not in connection with the potato deal; it was other insurance? A. That is correct.

Q. And the Barnett Tire Company; you checked that claim and that is not against the potato deal. Is that correct? A. Right.

Mr. Johnston: Now, I might state to the Court, if the Court will go up there, there is F. E. Peterson. At the prior hearing, Mr. Kendall also represents that creditor, and he withdrew that claim, as to any claim they might have against Kaufman & Brown, so far as that proceeding is concerned.

I will show you now, Mr. Kendall and Mr. Colby, all these claims. Some of these are not attached to the claims. You don't have any objection to that, because they were introduced as exhibits before, and I don't know the exhibits; I can refer to the claim without referring to the exhibits.

Mr. Kendall: Just so we will know the claim you are talking about.

Q. (By Mr. Johnston): This is a statement of the claim of the King Lumber Company. Will you look at that and tell us whether or not the merchandise that was received on that claim was

(Testimony of Gerry Horton.)

used in either one of the potato projects; that is, at Arvin, or Shafter, or both? [12]

A. I identify this as having been used on either one of the potato planting projects.

Q. The one that was operated in the spring of 1944 under this agreement with Kaufman & Brown?

Mr. Kendall: May we save time and confusion by cross-examining on each claim that is presented?

Mr. Johnston: That is all right with me. Go ahead, ask him anything you want.

Q. (By Mr. Kendall): How do you identify the claim as having been materials—as having been used in this deal?

A. From the fact these bills show here as having been contracted during the period of time we were doing nothing else but preparing to grow potatoes, and the lumber was purchased at that time, according to my recollection, for the construction of sluice boxes and things of that kind in the ditch work.

Q. And were those permanent improvements that could have been used for other and additional farm ventures beyond this transaction?

A. That is questionable. After being used in the season in open ditches, as a rule the wood is pretty well shot; it may not be. There might be some reclaimed. I wouldn't state that for sure.

Q. What I am getting at, Mr. Horton, would they be some improvement to the farm, that if they remained there the following year and you would

(Testimony of Gerry Horton.)

have been in business, they would have [13] been used thereon?

A. Some of that wood probably could have been used over.

Q. What I am further getting at is this: if any of these items remained, they wouldn't be the property of Kaufman & Brown; they would be your property? And if you went ahead and farmed and financed it the following year, you wouldn't have used those?

Mr. Johnston: That is argumentative. It is for the Court to determine under the contract who this belongs to. If this is a partnership between Kaufman & Brown, they would belong to the partnership.

Mr. McGugin: The contention is sustained.

Mr. Johnston: Probably this Referee doesn't know, but before we refer to the Shafter agreement and the Arvin agreement; the Shafter agreement is the one dated November 16, 1943. The Shafter agreement, when we refer to the Shafter property, instead of reading all the property description out, it is stipulated that when we refer to the Shafter property, that is the property that is involved in the agreement dated November 16, 1943. And the Arvin property is the one that is dated January 22, 1944.

Mr. Kendall: May I ask you a question here, counsel? When we came to the amounts of these claims, after discussing with you, you gave me a list of four claims you consider being possible claims

(Testimony of Gerry Horton.)

against this partnership or joint venture here, [14] the claim is not here of the King Lumber Company.

Mr. Johnston: No, sir, that isn't correct. There was an order introducing these, and we introduced some of these claims, and I told you at that time, and the record will bear me out, I would wait until he came out, because I didn't know.

Now, where is that? I don't need that. (Searching papers.)

Mr. Kendall: May I see that before you go ahead with Mr. Horton's testimony, your Honor?

Mr. Johnston: When you look at that, Mr. Kendall, the King Lumber Company claim was introduced in evidence, and the order approving it was introduced in evidence. One of those four claims I gave to Mr. Kendall, he says, isn't due.

Mr. Kendall: What?

Mr. Johnston: One of those four claims I gave to you, he says, isn't due.

Mr. Kendall: Yes, the Barnett Tire.

Mr. Johnston: The four creditors you said absolutely went on there, he says, didn't. So that is in your favor.

Q. (By Mr. Johnston): Now, Mr. Horton, I will show you—this was introduced in evidence as Exhibit 14-A before, and it is the—it is an itemized statement of the claim of the Pacific Gas & Electric Company. Can you tell from that claim whether or not electricity was furnished to either the Shafter farm or the Arvin farm, or both?

(Testimony of Gerry Horton.)

A. Yes, I can. [15]

Q. And that was during the time that—in 1944?

A. Yes.

Q. Can you tell what portion of that was furnished?

A. I believe all this, all of this bill, was for water furnished the Arvin and Shafter farms, with the exception of one item in the amount of 98.91, which had to do with another operation.

Q. You said “water.” You mean electricity?

A. Electricity, I should have said, yes.

Q. And on this statement, you checked all those items which were furnished to the—was the farm project?

A. I have.

Mr. Kendall: Let's see.

Mr. Johnston: Now——

Mr. McGugin: Ninety-eight; how much was that?

Mr. Colby: 98.91.

Mr. Kendall: Then from your total claim of 2946.52, we will have to deduct 98.91?

Mr. Johnston: Yes.

Mr. Kendall: Then isn't there a refund in addition, some additional credits?

Mr. Johnston: There was three thousand some dollars before, and in an order to show cause against it they came in and reduced it from three thousand odd dollars to that, and I got credit for that. [16]

(Testimony of Gerry Horton.)

Q. (By Mr. Johnston): Now, I will show you——

Mr. McGugin: Any cross-examination as to that?

Mr. Colby: Any cross-examination?

Mr. Kendall: No.

Q. (By Mr. Johnston): I will show you here this claim, it is marked 15-A and it was taken from the claim of the Central Canal Company, and ask you if you know where that water was furnished?

A. Yes, I do know where it was furnished.

Q. Where was it furnished?

A. On the Shafter piece.

Q. And was that furnished at the times mentioned in there and to the growing of these potatoes on this Shafter property in the year 1944?

A. Yes.

Mr. Johnston: Do you want to cross-examine him on that? That is the Central Canal Company.

Mr. Kendall: Only one question. On here he gave me a figure of 576.83, and it was 583.40.

Mr. Johnston: I will tell you what it was in their claim that is filed. They have interest, and I gave you that other without interest, so whatever it is they wouldn't be—the interest shouldn't go in there; that is the difference. Suppose you mark after that, Don, the interest is included?

Mr. Kendall: Yes. [17]

Q. (By Mr. Johnston): Now, the next item here is one marked 9-A; that is Bakersfield Hardware. Will you look at that and tell me if the merchandise

(Testimony of Gerry Horton.)

obtained on that was used on either one of these projects on which Kaufman & Brown were interested?

A. It is impossible for me to set off each amount correctly as having been used on either one of the two projects mentioned, but I know a portion of it was, things having to do only with potato planting; I know they were used on the potato deal. There may have been some items and——

Q. Can you look at that and tell us what was used on the potato deal and some weren't?

A. I can check the ones that were definitely used on the potato deal.

Q. All right, have you got a pencil?

A. Yes.

Q. All right, you check that.

Mr. Johnston: While he is checking that, we can save time. Mr. Kendall represents the Rosedale Warehouse Company, is the attorney of record for that creditor, and he is willing to stipulate or make a statement to the Court that that can be withdrawn as to any claim against Kaufman & Brown. Is that right?

Mr. Kendall: Yes, that claim is against a brokerage company and not against the Farms. [18]

Mr. Johnston: No, it is against the Farms. It has already been determined by the Court in a hearing had. It is for renting land out there in Edison, or some place like that. No, I am thinking of Irving Williams.

(Testimony of Gerry Horton.)

Mr. Kendall: Yes, I think you are.

Mr. Johnston: This, I checked with him the other day, and it is still against the Farms. If you say it isn't, you represent the creditor——

Mr. Kendall: Isn't that for potatoes purchased?

Mr. McGugin: We will take that other matter up in order, then.

Mr. Johnston: I was trying to save time here. I can find it, maybe. That is against the Company. Wait a minute, we have got two. There is one here. The other, it was three thousand and something, Rosedale Warehouse—3,511 against the Company. It is in here some place.

Q. (By Mr. Johnston): How many you got there?

A. After checking this thing over, I find I can identify—in fact, I can identify it by the dates as having been used on the potato operation entirely.

Mr. Johnston: You go ahead with your cross-examination if you want to. Here you are. See, this thing is headed "Gerry Horton Company Farms and Kaufman & Brown"; it is dated July 10, 1944.

Mr. Kendall: Apparently it was for digging and washing [19] some potatoes out at Shafter. Whether they were on this deal or potatoes he bought, he can testify.

Mr. Johnston: He has already testified to it.

Mr. Kendall: You had better put it on. I don't know. I was thinking of the other claim. I knew

(Testimony of Gerry Horton.)

that was definitely against the Company. I said I didn't know about this one.

Mr. McGugin: What claim are we considering now?

Mr. Johnston: He was on the Bakersfield Hardware. Do you want to cross-examine?

Mr. Kendall: No, no questions on the Bakersfield Hardware.

Q. (By Mr. Johnston): Now, Mr. Horton, during the year 1944, did you do anything on the Shafter property other than the raising of potatoes?

A. No.

Q. When you say "no," you mean that is all you did, was raise potatoes on the Shafter property.

A. That is all we did.

Q. Now, where is that again? I notice—I will withdraw that. Do you recall when they quit harvesting potatoes at Shafter?

A. Well, I can't describe the exact date, but I believe it was sometime in July of 1944.

Q. Well, I will show you the bill that is attached to the claim of Rosedale Warehouse, and it is charged to Gerry Horton & Company Farms and Kaufman & Brown; it is dated July 10, 1944. And would that help you out in refreshing your memory as to when they stopped digging potatoes at Shafter?

A. This, apparently, is an invoice for balance due. It is dated July 10. And knowing the practice of the Rosedale Warehouse Company, I pre-

(Testimony of Gerry Horton.)

sume that they presented this bill just about a day or two after our harvest was finished; so I judge we must have finished somewhere between the 4th and 9th or 10th of July.

Q. Now, this Pacific Gas & Electric Company bill, I notice some of those items run after June 8th there.

Mr. Kendall: Wait a minute. Are you going back on the P. G. & E. bill?

Mr. Johnston: Yes, I am going back on that. I am refreshing his memory on this to get the date.

Q. (By Mr. Johnston): Can you explain from that why those charges are from June 8 to August 4; the last one down here, for instance (indicating)?

A. On that last item, I imagine that that service was used in connection with our Farm help. It states here it is for lighting service for the residence located on that property.

Q. And that was during the raising of the potatoes?

A. Yes. We kept a portion of the crew out there all during that period.

Q. What I am getting at: You can't divide that up? [21] There is no way to divide that up from June 8 to August 4?

A. I don't know how it could be done.

Q. Now, referring to this Rosedale claim, it hasn't been introduced in evidence before. Will you look at that, and can you tell me if that claim is in

(Testimony of Gerry Horton.)

connection with this potato deal in which Kaufman & Brown are interested?

A. Yes, this claim is in connection with the Shafter potato growing project.

Mr. Johnston: I will ask that that claim be introduced, then, in evidence.

Do you want to ask him any questions on that, Don?

Mr. Kendall: Yes.

Q. (By Mr. Kendall): Do you know what the claim arises from, what it consisted of?

A. If you will let me see that. The first portion of the claim was, if I remember correctly, was on a clean-up of potatoes we had left in the warehouse from going to the dehydrater; the balance of the claim is for weighing and washing and digging of the potatoes, also for gasoline used in the tractor of the Rosedale Warehouse Company used in the digging of the potatoes.

Q. Now, did you hire the Rosedale Warehouse Company to dig your Shafter potatoes?

A. If I remember correctly, a portion of them. I don't know whether they dug them all, or we dug a portion of them. [22]

Q. It says "digging 54.7 acres." How many acres did you farm at Shafter?

A. We farmed right close to a hundred and eighty, if I remember correctly, so apparently, we dug part of our own.

Q. You don't recall, you can't definitely testify,

(Testimony of Gerry Horton.)

this was on your deal or on some potatoes you bought and run in there?

A. I can tell it was definitely on their deal, because I bought nothing in the way of acreage in Shafter that year.

Q. Did you broker any potatoes other than your own?

A. Anything I took out of Shafter that year were bought, scraped and washed, in carload lots only.

Q. You didn't buy any acreage and have it washed through the Rosedale Warehouse shed, other than the actual acreage you farmed under this financing deal with Kaufman & Brown?

A. To the best of my knowledge, that is correct.

Q. This bill represents potatoes grown by you in connection with this Kaufman-Brown financing deal?

A. Yes.

Mr. Kendall: I wish, then, Mr. Johnston, so the record is clear, as much as I represent two clients here and I represent Rosedale Warehouse in filing that claim, to state that the statement in withdrawing that was incorrect.

Mr. Johnston: Yes. When you talked to me over there, you said you thought it didn't belong, so I understood you were [23] withdrawing it.

Mr. Kendall: I understood at the beginning it was against the other Company, but apparently there are two claims, and so I will submit that on the facts.

(Testimony of Gerry Horton.)

Q. (By Mr. Johnston): Mr. Horton, I show you the claim here of A. H. Karpe Implement Company and ask you, yesterday, if you checked the items on there which you believe is in connection with the potato deal with Kaufman & Brown that were grown on Arvin and Shafter properties. Is that right? A. Yes.

Q. And those that are not checked on there are the items chargeable to the Arvin and Shafter property? A. Yes, that is correct.

Q. Let's see, they add up, for the purpose of the record they were added up, and they total 169.83.

Mr. Kendall: Out of the 265.64?

Mr. Johnston: Wait a minute. You are going too fast for me. Is that Karpe? Yes.

Mr. McGugin: The amounts are chargeable to whom?

Mr. Johnston: Kaufman & Brown.

Mr. Kendall: 169.83, according to his testimony.

Mr. Johnston: I want to introduce that claim at this time.

Mr. Kendall: Are you through examining on that?

Mr. Johnston: Yes. [24]

Mr. Kendall: Which items are the ones that are included on this, to save a lot of examining?

Mr. Johnston: He says the ones which are checked is the ones he testified to.

Mr. Kendall: Are included.

Q. (By Mr. Kendall): Mr. Horton, were you

(Testimony of Gerry Horton.)

farming beets out there at that time? A. No.

Q. I notice an item in here of eight beet hoes. You don't use beet hoes on potatoes.

A. We used the beet hoes to clean out a portion of our acreage overrun with Russian Thistle. We had a crew of hands in there, pulling Russian Thistle out.

Q. It is an unusual condition to weed potatoes, that is why I was asking. A. Yes.

Q. I notice—Only the ones that are checked are the ones they are claiming?

Mr. McGugin: That claim, as well as the Rose-dale Warehouse claim, will be received in evidence.

Q. (By Mr. Johnston): Now, we refer to the General Petroleum claim. I will show you that and ask you if you have eliminated any items on there as not belonging to the growing of potatoes with Kaufman & Brown on the Shafter and Arvin properties? [25]

A. Yes, I have eliminated some items.

Q. And those have been marked out?

A. Yes, they have.

Q. And so those items that are marked out should be subtracted from the total?

A. That is correct.

Q. Let's do that.

Mr. McGugin: While you are doing that, we will take a five minute recess.

After recess, all parties being present, the following proceedings were had:

(Testimony of Gerry Horton.)

Mr. McGugin: Are we ready to proceed?

Counsel: Yes.

Q. (By Mr. Johnston): Mr. Horton, here is a claim of Ace Tractor Company.

Mr. Kendall: You didn't get the amount of the preceding.

Mr. Johnston: He asked me the General Petroleum claim. Mr. Horton, he subtracted those figures, and it is 36.06 claimed against the potato deal. Is that right, Mr. Colby?

Mr. Colby: That is right. And I will ask that the claim be introduced in evidence.

Mr. McGugin: Received.

Q. (By Mr. Johnston): This exhibit is marked 12-A; it is the sheet from the claim of the Ace Tractor Company. Can you [26] tell me from that claim whether or not that was on this potato deal or not?

A. No. It is impossible for me to determine just what it was for.

Q. And you have no independent recollection of what it was for?

A. I know what the tractor would be for, but other than that I don't know, don't have any recollection.

Q. And you don't know when the obligation was incurred, what year? A. No, I don't.

Mr. Johnston: All right, so that can be—this one of Ace Tractor Company couldn't be against them; from his testimony couldn't be against them.

(Testimony of Gerry Horton.)

Mr. McGugin: It would be against the Farms only?

Mr. Colby: Against the Company only.

Mr. Johnston: No, no, against the Farms. It is a claim in the bankruptcy, not against Kaufman & Brown.

Mr. Colby: I get it.

Mr. Johnston: I fixed this for the Referee, and I think that—there are the claims, and I think those are correct. Those are the claims against the Company; they have nothing to do with these proceedings, that is, right now.

Mr. McGugin: Yes, the same note is on there as to Irving Williams, then? [27]

Mr. Johnston: What?

Mr. McGugin: Should that Irving Williams also be 768?

Mr. Johnston: This should be off (indicating).

Mr. Kendall: You can't have them both.

Mr. Johnston: No, that should be off. That is how I noticed it, but——

Q. (By Mr. Johnston): I will show you Exhibit 18-A; it is the itemized statement of Stroud & Seabrook. Will you look at that and tell me whether any of that merchandise was used on either the Arvin or Shafter ranch in connection with this Kaufman-Brown matter?

A. Yes, that would have been used on either one of the ranches, because that is supposed to be

(Testimony of Gerry Horton.)

the only deal for which we would have bought irrigation pipe.

Mr. Johnston: All right, you can cross-examine.

Q. (By Mr. Kendall): There is an "alfalfa valve." You weren't raising any alfalfa there?

A. No, that is the name.

Q. That is the name of the valve. You use it for any crop?

A. Yes, when you farm land.

Q. (By Mr. Johnston): Now, here we refer to an itemized statement of the Wasco Hardware Company. Will you look at that and tell us if you know whether or not the merchandise received on that was used in connection with either one of the projects [28] in which Kaufman & Brown are interested?

A. Again judging from the dates, a portion of this account, at least a portion of this, of these items, were used on the potato growing activities.

Q. Well, can you tell what portion?

A. Yes. Their statement in the amount of 29.39, February 22, was used on the potato deal. Their statement for various amounts here, used in February, 1944, were on the potato account.

Mr. Kendall: 25.95?

Mr. Johnston: No, that couldn't be, Don. It hasn't been recapped.

Mr. Kendall: Oh, I see.

A. An item dated July 10, '44, was not used on the potato account.

(Testimony of Gerry Horton.)

Mr. Johnston: That is a credit (looking at bill).

A. Certain items dated in January, 1944, were.

Mr. Johnston: May I see this? This is all credit; that is washed off. Wait a minute. He says that wasn't it; that would be 12.56 off the total.

Mr. Kendall: 12.56 off 81.02?

Mr. Johnston: It will be 68.46. Is that correct?

Mr. Kendall: Yes.

Mr. McGugin: For?

Mr. Johnston: For Wasco Hardware. [29]

Mr. McGugin: Chargeable against the potato deal, also?

Mr. Johnston: 68.46 is charged against them. But if this hasn't been introduced in evidence, I want to introduce it in evidence now.

Mr. McGugin: So received.

Mr. Johnston: Now, you have seen these before, Don? I want to introduce in evidence at this time the chattel mortgage of the Kern County Bank as recorded in Book 1161— that is wrong—it is 1171, page 39. It has a copy of the note, and it is understood with Mr. Kendall we wouldn't have to introduce that original note.

Mr. Kendall: That is the original recorded instrument?

Mr. Johnston: Yes. I am going to introduce that but not the original note.

Mr. McGugin: Received in evidence.

Q. (By Mr. Johnston): Now, Mr. Horton, I will show you the Kern County Bank statement

(Testimony of Gerry Horton.)

with Gerry Horton Farms and ask you if the two deposits on there, one for five thousand and one for seven thousand five hundred, are the proceeds of the money that you received upon the bank loan of which you gave this chattel mortgage?

A. I believe that is correct.

Q. Now, I will hand you some checks here that—well, I will withdraw that. You went over certain checks, and they have been checked off on this statement; haven't they? [30]

A. Yes.

Q. And all those checks you checked off on those statements were used, the money was used, in the farm project, either at Arvin or Shafter, on which Mr. Kaufman and Mr. Brown were interested. Is that correct?

A. During those dates, any money used for—any money withdrawn from the bank must have been used on those two deals, because those were the only deals I was in.

Q. Now, I will show you the checks that you have checked off. I will show you the checks as checked off there and ask you to examine those checks and tell use whether that money was used.

Mr. McGugin: Will you give us the dates, too? Between what dates were these deals in?

Mr. Johnston: These were in January.

A. December of '43, to and including December 31st. You want me to identify each check?

Mr. Johnston: I have the check stubs; but if the

(Testimony of Gerry Horton.)

Referee wants you to identify each check, and the counsel on the other side do, there is the check stubs.

A. Our check 313 to the Treasurer of the United States in the amount of \$250.00 was for tractor rental, tractor which we rented from the Department of Agriculture here, for the preparing of our land in Shafter and Arvin. Our check 6, dated December 24, 1901— [31]

Mr. Colby: Just a moment; your Honor, it is going a little fast for me. I wish to raise an objection. I wish to know whether the Kaufman-Brown is going to be charged for the expense of the bankruptcy for him. Is that the theory?

Mr. Johnston: This money was used. I figure part of this money was used by the partners.

Mr. Kendall: This loan was a loan that Gerry Horton made with the bank and pledged his own acreage for.

Mr. Johnston: That doesn't make any difference. The money was used.

Mr. Kendall: In that account, you will have to have a complete accounting on the potato deal.

Mr. Johnston: We have had a complete accounting on the potato deal, and the orders to show cause have been issued, and they have been sent out by Mr. Bergman to your clients.

Mr. Colby: You didn't answer the other question. I don't understand it. Can counsel explain it?

(Testimony of Gerry Horton.)

Mr. McGugin: You don't have any objection to the form I can rule on.

Mr. Colby: Object; it is incompetent, irrelevant and immaterial, and it has no bearing on the issues of this case, and that the respondent on this order to show cause cannot be held or bound by any expenditure of the bankrupt while he conducted the business.

Mr. Kendall: I will supplement that by stating that the [32] only matter before the Court now is whether or not this claim of the Kern County Bank can be chargeable against the Kaufman-Brown.

Mr. McGugin: Now, you are——

Mr. Kendall: It is obvious that Horton goes out individually and borrows some money; that is owed by him, whether that money is afterwards put on the deal or whether he spends it himself. It still doesn't make Kaufman-Brown liable. The bank loaned money to Horton and not to this deal, or to any combination of Kaufman, Brown and Horton. They loaned it to Horton and took a check, a chattel mortgage, on certain equipment which is listed. And what Horton did with the money is his own business and doesn't bind anyone else.

Mr. Johnston: That is not correct. We are here for the purpose of finding out what was used on this project. Now, if this agreement, if they were partners, if the money was used in that project, the bank would be entitled to be reimbursed for the amount of the money. This money—and the checks

(Testimony of Gerry Horton.)

show; the witness will so testify when asked—the money was used to buy seed and potatoes to plant into the ground. And I don't have any objection to their questions and objections to go in the record, but I want to get the evidence in.

Mr. McGugin: Yes, I think probably their objection is more on the argument of whether or not there is any liability [33] on the part of Kaufman & Brown Company.

Mr. Kendall: That is correct, your Honor. To put it bluntly, if you and I were partners and we had a deal together, and I went to the bank and borrowed money to put in the partnership, that wouldn't make you liable.

Mr. McGugin: I think I will overrule the objection. That doesn't necessarily mean I have decided that Kaufman & Company are liable on this debt; but at the moment, until we get the evidence in, we won't decide on a question of law.

Mr. Colby: The witness testified as to the first check. Let him proceed.

Mr. Johnston: Here are your bank stubs. If you want to use them to look at here, you can.

A. Gerry Horton Farms, check #6, December 24, 15.01, Railway Express Agency, was for two sacks of seed potatoes for a test plot, sent from Minnesota.

Check 333, December 17, 18.00, labor.

Check 7, December 24, \$55.00, labor.

Mr. McGugin: Labor on the ranch?

A. Yes.

(Testimony of Gerry Horton.)

Mr. Johnston: It was either one or the other.

A. Check 337, amount 1743.53, was for a seed potato purchase.

Check 325, December 10, 1986.37, was for a seed potato purchase. [34]

Check 330, December 16, 337.06, was for freight charges on seed potatoes.

December 20, \$5062.50, was made to the Kern County Bank and apparently was in payment of a draft for seed potatoes, because the car numbers are listed in the voucher.

Q. (By Mr. Johnston): Will you look at the draft. By looking at the stub, can you tell from that?

A. Yes. I have the stub before me now, and that is correct.

December 21, check 2, 168.53, was for freight charges on seed potatoes.

Check 324, December 10, 23.43, freight charges on seed potatoes.

Check 329, December 11, 23.25, labor.

Check 328, December 11, 35.25, labor.

Check 334, December 17, \$18.00, labor.

318, \$40.00, December 9, labor.

Check 319, December 9, \$1000.00, to Gerry Horton Company. I will have to check that with the stub.

Mr. Johnston: You haven't got the stubs that far. I will look in this other book. Wait a minute.

A. 319—

Mr. Johnston: 319, you don't have any check stub on that.

(Testimony of Gerry Horton.)

A. The check is made out to Gerry Horton Company. It was a transfer of funds from the Farm to the Gerry Horton Company [35] and deposited in the Kern County Bank. I don't know what the reason was for the transfer, but that was what it was.

Check No. 3, December 23, 32.25, labor.

Check 335, December 17, \$8.00, labor.

Q. All right. Then look at your January statement from the Kern County Bank and refer to that portion above the place here, deposit 853.94, and I will ask you if you have gone through and checked off the checks in there which you believe is connected with the growing of the potatoes on the Shafter and Arvin Farms in which Kaufman and Brown were interested. A. I have.

Q. Do you have the checks there? Will you tell the Court the number of the checks and what they were for?

Mr. McGugin: The earliest date?

A. Beg your pardon?

Mr. McGugin: Is there another date involved here from January on this? Is this the same ranch, the same year?

Mr. Johnston: Yes, '44. It can be understood, I think, all these dates as referred to is from December—from November 16, 1943, to the year—sometime in the year '44; that is, when the potatoes were taken out.

Mr. Colby: Yes.

(Testimony of Gerry Horton.)

A. Check 8, December 29, 153.55, freight charges on the seed potatoes.

Check 9, December 29, \$15.00, labor. [36]

January 3, 21.12, labor; that was check No. 10.

Check No. 11, January 3, 112.50, labor.

Check 12, January 3, 77.25, labor.

Check 13, January 3, 60.75, labor.

Check 14, January 3, 12, labor.

Check 15, January 4, 208.06, freight on seed potatoes.

Check 34, January 10, 19.50, labor.

Check 35, January 10, \$35.00, labor.

Check 33, January 10, 22.43, labor.

Check 32, January 10, 29.25, labor.

Check 30, January 8, 168.53, freight on seed potatoes.

Check 28, January 8, \$250.00, rental on tractor.

Check 26, January 5, 12.06, to the Cousin's Tractor Co. I imagine that is repairs, but I don't know.

Q. If you don't know, then take it out.

A. Check 21, January 5, 20.32, King Lumber Company, with no notation on here. I am sure it must have been for lumber used in the potato farming operation at that time.

Check 17, January 5, 7.84, Bakersfield Hardware Company. I can't positively identify that.

Q. All right, let's leave that out.

January 5, 16, 267.92. It is made to the Egland Lumber Company, and that must have been for lumber used on the farming operation.

(Testimony of Gerry Horton.)

Check 36, January 11, 6.30, I cannot identify.

Check 41, January 11, 101.50, gasoline for the Shafter ranch from the Standard Oil Company.

23, January 5, 9.17, I am unable to identify.

Mr. McGugin: Let's see. You did identify this 41 check, did you not?

A. Yes. Check 326, December 10, '43, 116.65, freight on seed potatoes.

Check 327, December 11, \$48.00, labor.

Check 332, December 16, 30.75, labor.

Check 27, January 7, 75, labor.

Check 40, January 11, 32.01; that was not used in the potato operation.

Check 37, January 11, 12.30; again, that was not used in the potato operation.

I don't know what this one is; it is a voucher memorandum.

Mr. Johnston: December——

A. Here is the check. Apparently we forgot to use the word "Farm," and it was charged to Gerry Horton.

Q. That is the same thing as the check. Now, all of those that you speak about, that were used in the farming operations, were used either on the Shafter or Arvin farms in which Kaufman-Brown were interested, pursuant to this contract?

A. Yes.

Q. And these—I will take and show you: These checks, 36, 40, 23, 17, 26, 319 and 37, are checks that you can't [38] identify as being with the farming operations?

(Testimony of Gerry Horton.)

A. Yes, that is correct.

Mr. Johnston: Now, I will ask that all these be introduced in evidence.

Mr. Colby: Subject to the same objection for the record, your Honor; subject to the prior objection. It is incompetent, irrelevant and immaterial and not binding upon Kaufman & Brown.

Mr. McGugin: Yes, the objection will be overruled, and they will be received in evidence as a single exhibit.

Mr. Colby: No questions now.

Mr. Johnston: Where are those claims? May I have those?

Mr. Kendall: Yes.

Mr. McGugin: No questions on the checks?

Mr. Kendall: What is that?

Mr. McGugin: You have no questions on the cross-examination?

Mr. Kendall: No questions on the cross-examination.

Q. (By Mr. Johnston): Here is a claim of Larkin-Morris that has heretofore been introduced in evidence as No. 8. I will ask you to look at that claim, and particularly the itemized statement, and tell whether or not that has anything to do with either the Arvin or the Shafter farms, growing the potatoes in connection with the Kaufman-Brown deal?

A. Yes. This is for work done on the Arvin property, for leveling and scraping the land. [39]

(Testimony of Gerry Horton.)

Q. And which land was that?

A. That was the land at Arvin.

Mr. Johnston: Now, for the purpose of the record, I want to show here, as far as this claim is concerned, the agent of Kaufman-Brown claim that wasn't a valid claim, so at his request filed an objection to it, and it was set for hearing three or four different times, and he didn't show up.

Mr. McGugin: Who didn't show up, the claimant?

Mr. Johnston: Mr. Banowich—I don't know, whatever his name is——

(Off record discussion as to name.)

Mr. Kendall: Mr. Banowich.

Mr. Johnston: And Mr. Kendall tried to get him to come up, if he could, and he wouldn't show up; and we didn't have any evidence, and so this claim was allowed by Referee Bergman on the testimony of Mr. Morris. I have no objection at this time if Mr. Kendall wants to propound any questions to Mr. Horton as to the validity of that claim. And I say that as far as Mr. Kendall is concerned, so if they want to make any objections and later on it is possible to reject that claim they can, because Mr. Kendall still claims it isn't a valid claim. It has been allowed after a hearing, and I don't know what can be done.

Q. (By Mr. Kendall): Are you familiar with the transaction under which that claim arose?

A. Yes. [40]

(Testimony of Gerry Horton.)

Q. You had a lease, did you not, from Morris and Larkin? A. We did.

Q. And that lease was to Gerry Horton or Gerry Horton Company?

A. Gerry Horton Farms, or Company; I don't know which.

Q. It is a written lease? A. Yes.

Q. You don't have a copy of that in your file, do you? Are these copies the same? December '43 and the 31st day of December, the southwest quarter and the southeast one-half, the east half—are these other ones? They had several leases?

Mr. Johnston: This is the only one I can find in the file. A. We had four leases.

Mr. Kendall: They had four leases covering that property. I ask that these be marked and introduced in evidence.

Q. (By Mr. Kendall): Now, those were the written leases you had covering all the land you were leasing from Larkin and Morris. Is that correct? A. Yes, I believe so.

Q. And Kaufman & Brown were not a party to that lease, or had any assignments or interest therein?

A. No, they were not interested in the lease, nor an assignment of the lease.

Q. This deal with Kaufman & Brown, as shown by the agreements [41] on record here were only for the potato crop in Arvin and Shafter in the year '44? A. That is correct.

(Testimony of Gerry Horton.)

Q. And your leases ran for several years, did they not? I believe they are five year leases?

A. The leases at Arvin, yes.

Q. That is what I mean: Your Arvin leases were for five years. This claim arises out of work done on the Arvin land? A. Yes.

Q. And under the terms of the lease you was to do the leveling of that land?

Mr. Johnston: I think the lease speaks as the best evidence, Mr. Kendall.

Mr. Kendall: I just wondered if he recalled the leases. As I recall it, they were to pay it—rather, level the land.

Q. (By Mr. Kendall): Did you make any separate agreement with them, other than set forth here, to modify the leases to have them do the work?

A. I don't recall having any oral agreement with them, or any other kind of agreement.

Mr. Kendall: That is the nature of the claim. We couldn't get Mr. Horton there to testify on that.

Q. (By Mr. Kendall): It is your statement you made no oral agreement with them modifying the conditions of the lease? [42]

A. No, that is correct.

Q. And you never agreed to pay this money?

A. No.

Mr. Kendall: Well, therefore, I object—I have made my objections, then, to this claim, and I object to the introduction of that claim against Kaufman & Brown on the grounds it is immaterial and irrelevant.

(Testimony of Gerry Horton.)

Mr. Johnston: It has already been introduced before.

Mr. Colby: So far as they are concerned?

Mr. Kendall: Not in this hearing.

Mr. Johnston: You check the transcript, then, the claims that have been considered and approved.

Mr. McGugin: I don't think the claim is valid against anybody.

Mr. Johnston: The Court has already ruled on that. If the Court wants another order or another citation——

Mr. McGugin: As I understand the lease, no modification of this lease is good unless written and executed.

Mr. Kendall: We did not have evidence to offer at the time, other than the leases and the writing there, and Mr. Horton, of course, wasn't here at the time, and he couldn't give the testimony he did today; but, in any event, it would be apparent, even if the claim was allowable against the bankrupt, it wouldn't be allowable against Kaufman & Brown because it would be an improvement of land over a period of [43] five years, as far as leveling is concerned, and not——

Mr. McGugin: No, I don't think it should be allowed against the potato deal. I think the Court will deny it right now.

Mr. Johnston: Of course, when you finally decide it is against the potato deal, if it is not against the potato deal, then these gentlemen are through as far as they are concerned.

(Testimony of Gerry Horton.)

Mr. McGugin: These four leases will be—do you think it is necessary to receive these in evidence?

Mr. Colby: Yes, it should be.

Mr. Kendall: It will show these leases were for a five year period, and they are on land—we don't want to clutter up the record, but we want to be safe on that. We will introduce them as one exhibit, but there was only one parcel of land out there, and he had four leases.

Q. (By Mr. Kendall): Is that correct? You had four leases out there? A. Yes.

Mr. McGugin: All right, so received in evidence.

Q. (By Mr. Johnston): Well, I will show you the claim here of Bakersfield Garage & Auto Supply Company, and ask you to look at that and tell us, if you can tell, whether or not that bill is connected with the Arvin or the Shafter deal of the growing of potatoes in the year 1944?

A. This claim is for repairs to one of the trucks used in [44] our operation; but it would be virtually impossible for me to state how much the truck was used in the potato operations as against any other operations it might have been used for.

Mr. Johnston: All right, do you want to ask him anything on that?

Mr. Kendall: No.

Q. (By Mr. Johnston): Now, I can't find the claim right now. There is a claim in there of an Ames, Harris Neville Company for 33.12.

(Testimony of Gerry Horton.)

A. It could only be for potato sacks, shims or twine.

Q. Do you know whether that is connected with the—do you know whether or not it is connected with the Farms, or not?

A. I couldn't state definitely, no, because it could have been for the previous year, having been potato sacks. I couldn't identify it positively.

Q. Here is the claim here for 33.12 and shows—it was in April?

A. There is no date on there, and I can't positively identify that as having been used.

Q. All right, that is not in. Now, there is a claim here of Meagher-Morris and Rexroth & Rexroth. We had those yesterday. All right. Now, can you look at that, the claim of Meagher-Morris and tell me what that is for?

A. That is for automobile repairs on either the trucks or the Studebakers, but I can't— [45]

Q. Can you identify it with these farm operations? A. No, not that way.

Q. Now, here is Rexroth claim; Rexroth & Rexroth, it says. Now, will you look at that claim and tell whether or not the charges on that claim is connected with these deals Kaufman & Brown were interested in?

A. Yes, those charges were in connection with the Shafter operation.

Q. During the year 1944? A. Yes.

Q. When Mr. Brown and Mr. Kaufman were interested? A. Yes.

(Testimony of Gerry Horton.)

Mr. Johnston: Now, I see that claim hasn't been introduced. I will ask that that claim be introduced in evidence at this time.

Mr. McGugin: So received.

Q. (By Mr. Kendall): Mr. Horton, what was the clam bail digging operation on the farm at Shafter May 8th and 9th?

A. That was for a pump sump we had dug on the southwest corner of that property. Some of the potatoes were flooded, and we had to get rid of the water. We dug this sump and put on the pump.

Q. You were still digging potatoes there then?

A. Yes, on that portion of the land.

Mr. McGugin: Ames, Harris, etc? [46]

Mr. Johnston: We didn't introduce those because we couldn't sustain those.

Mr. McGugin: That Irving Williams?

Mr. Kendall: That was not against the potato deal.

Mr. McGugin: That leaves the claim of the Trustee for the Farms.

Q. (By Mr. Johnston): Now, you have looked at the claim here of the Trustee of the Company against the Farms; haven't you?

A. I don't know that I have.

Q. That one there (indicating).

A. Oh, yes.

Q. Now, all of the debts were paid off by the Company to the Farms; and, according to those records, there is due to the Farms—there is due

(Testimony of Gerry Horton.)

by the Farms, rather, to the Company a certain amount of money?

Mr. Colby: Just a minute, please, before you answer. It is objected to as calling for a conclusion of the witness and not the best evidence. I should be permitted to examine the witness on voir dire. I don't know what he is reading from, or what those memorandums are, who prepared them.

Mr. Johnston: All right, examine him.

Q. (By Mr. Colby): All right, Mr. Horton, you are examining a claim on file here. I don't know whether there is an exhibit number, or not. It is signed by Wayne Long. Who [47] is Wayne Long?

Q. (By Mr. Kendall): Isn't that against the Farms? A. Yes, it is against the Farms.

Mr. Johnston: Yes, that is what he testified to.

Mr. Kendall: It is a claim that inter-exchanges between the Farms and the Company.

Mr. Johnston: Here is the thing: I mean that is all the claims that have been introduced in evidence, because we represent all the creditors here, and I don't want one of those creditors to come back and holler. I have given the notice, and they didn't show up at the other hearing, and they didn't show up now, and here is the bankrupt; let him testify.

Mr. McGugin: Let me understand clearly—or correctly, that is.

Mr. Colby: I object——

Mr. Johnston: Wait until I get through, and then you can make your objection.

(Testimony of Gerry Horton.)

Q. (By Mr. Johnston): You examined this claim yesterday, this claim of the Trustee of the Company against the Farms; didn't you?

A. Yes.

Q. And that is, it shows a balance of 38,770.24. Now, there were only two claims here, two amounts, that you can identify with these farming projects. Is that right? You checked those off yesterday?

A. Yes.

Q. And both of those have been paid?

A. That is correct.

Q. So that on that claim there, there isn't anything that shows against either one of these farming projects?

A. That is right.

Q. That is, in which Kaufman & Brown are interested in?

A. That is right.

Mr. Kendall: All right.

Mr. Colby: All right.

Mr. Kendall: I think that completes the list.

Mr. Johnston: Now——

Mr. McGugin: Do you want me to make a finding of facts on this matter at this time, Mr. Johnston?

Mr. Johnston: No, I am not through. If I can find——

Q. (By Mr. Johnston): Now, I will show you Exhibit 4 that was introduced as Exhibit 4 before, the First Report and Account of Trustee and Petition for First Dividend, and refer you to the page—at the heading that is marked "Farms," and it

(Testimony of Gerry Horton.)

is marked Exhibit B-1, being the receipts in connection with the Farm, and I will ask you to look down that report and tell me if any of those receipts came from the potato operation which Kaufman & Brown is interested in.

A. The accounts receivable, I can't identify at all.

Q. You believe this came from the Kaufman & Brown potatoes [49] out there?

Mr. Kendall: From the sale of potatoes.

A. I believe so.

Mr. Johnston: Can we check this, your Honor? Can I check that?

Mr. McGugin: Yes.

Mr. Johnston: All right.

A. The sale of the Banducci lease to Kaufman & Brown——

Q. (By Mr. Johnston): Now, here is the Lebec Potato Company, so many sacks of potatoes. Those, that item is for——

Q. (By Mr. Kendall): Those are sacks?

Q. (By Mr. Johnston): Those were purchased in connection with Kaufman & Brown, and then sold in the bankruptcy?

A. Yes, that is right.

Q. (By Mr. Kendall): The pipe was used in the farming operations?

A. Yes, it was all used in our farming operations; some of it could be used in our potato operations. I don't know.

(Testimony of Gerry Horton.)

Q. (By Mr. Johnston): It was purchased with the funds from the potato deal?

A. Some of it could have been, and some of it we had before.

Q. Do you know how much?

A. No, I don't know how much pipe was purchased during the latter part of '43 and '44. I know definitely that a [50] portion of that pipe was used in the potato deal. How much, I don't know.

Q. It wasn't whether it was used; that wasn't the question. It was whether it was purchased in this operation. Anything that was received as receipts from the operation of that potato contract.

A. I know some pipe was purchased for that potato deal; how much, I don't know.

Q. Would it be half of it you had used there, or a third of it?

A. I would say we purchased about half, yes. This potato roller was purchased for that deal. And this Killifer carrier and ditcher was purchased. Twelve bundles of twine were purchased for the potato deal. Two hundred gallon gas tank; a thousand gallon gas tank and pump, and five grease guns, and ten-foot G. B. Scraper.

Q. Now, during the year 1944, did either Mr. Kaufman or Mr. Brown come to Bakersfield?

A. Yes.

Q. Which one?

A. Both of them came at different times.

Q. Where did they have an office?

(Testimony of Gerry Horton.)

A. They had no office of their own.

Q. They used your office, didn't they?

A. Yes, when they wanted to. [51]

Q. And were your books open to their inspection at all times?

A. Yes, any time during business hours, or any time they wanted to see them.

Q. I want to clear this up. This is not in connection with this, but I want to ask you this to clear the record. Your books show in this account—based on the books show—that Kaufman & Brown is indebted to the Company, and I forget the amount, some odd three thousand dollars. Now, your recollection is that Kaufman & Brown paid up everything due to the Company, and there was nothing due by them to the Company?

A. That is correct. I didn't know. I didn't remember that they owed anything.

Q. The reason I am doing this: that is the record I got when the thing was turned over to me. It shows that there was an indebtedness. While you are here, I am going to clear it up; I want to get the right amount. It shows there is a balance due to the Company of 3,170.74.

A. To the best of my knowledge, they didn't owe us anything.

Q. It was paid up? A. That is right.

Mr. Johnston: Now, if it hasn't been introduced in evidence, for the purpose of the record I want to introduce the involuntary petition that was filed.

(Testimony of Gerry Horton.)

Mr. McGugin: All right, so received.

Mr. Johnston: I don't know if it has been introduced, or not.

Mr. Kendall: It is an exhibit down there.

Mr. Johnston: I don't know whether he admitted it, or denied it, or what.

I think that is all.

Cross-Examination

By Mr. Colby:

Q. Now, Mr. Horton, prior to your execution of the first agreement——

Mr. Johnston: Is he your witness now?

Mr. Colby: What?

Mr. Johnston: Are you calling him as your witness?

Mr. Colby: Not yet. Let's see how far I can go on cross-examination.

Mr. Kendall: They were introduced and discussed.

Mr. Colby: The contracts were introduced?

Mr. Johnston: Go ahead and ask him.

Mr. Colby: This is preliminary, anyway.

Q. (By Mr. Colby): The first agreement that has been produced in evidence, dated November 16, 1943, how long had you known Kaufman and Brown prior to that, approximately?

A. I had known—well, I never knew them very well. I was acquainted with them as having been in the industry for several years. [53]

(Testimony of Gerry Horton.)

Q. Had you ever done business with them before?

A. No.

Q. At that time, November 16, 1943, what was your business or occupation?

A. Distributing and growing of potatoes.

Q. Under what name did you operate?

A. Gerry Horton Company, and Gerry Horton Farms.

Q. And who else was interested with you in that business? A. J. D. Althouse.

Q. And was that a copartnership between you and Mr. Althouse? A. Yes.

Q. And did you keep separate operations, the Farms and the Company?

A. We had separate sets of books, I believe. As we progressed in our operations, the activities of one was more or less affiliated with the other. In fact, we were sometimes mixed up together.

Mr. McGugin: I think we will take a five minute recess at this time.

After recess, all parties being present, the following proceedings were had:

(After recess, all parties being present, the following proceedings were had:)

(The last question and answer above are read by the reporter.) [54]

Mr. Colby: What was the operations of the Gerry Horton Company?

(Testimony of Gerry Horton.)

A. The Gerry Horton Company was primarily a distributing agency, a sales agency, and a means by which we distributed the produce of the Gerry Horton Farms.

Q. Prior to the November 16, 1943, did you have any conversation with Mr. Kaufman or Mr. Brown?

A. Prior to?

Q. That is, the date of the first contract.

Mr. Johnston: Now, I am going to object to this as not proper cross-examination. There is nothing having been asked in direct by me of this witness as to either one of these contracts.

Mr. Colby: Except the introduction of the contracts.

Mr. Johnston: Those contracts were introduced by you at the last meeting.

Mr. Colby: To avoid any question about it, your Honor, instead of calling it cross-examination, let's call him as our witness.

Mr. Johnston: All right.

Mr. Colby: After all, it is testimony before the Court, I think, that is going to be determined; not whose witness it is.

GERRY HORTON

as a witness for Kaufman & Brown, testified as follows: [55]

Direct Examination

By Mr. Colby:

Q. So the question was: Did you have any conversation with either one of those men, Mr. Horton?

A. That date, was that the date the contract was written?

Q. I will show you those contracts here that have been introduced into evidence.

Mr. Kendall: There is one on the Shafter and one on the other one. They are both practically the same.

Mr. Colby: 16th day of November, 1943; did you have a conversation prior to that date?

A. Yes, I talked to——

Q. How long prior?

A. Oh, I imagine a month or so.

Q. And where did that conversation take place?

A. In Chicago.

Q. And what place in Chicago?

A. In the Kaufman & Brown Potato Company.

Q. And was there anyone else present besides yourself and Mr. Kaufman?

A. Mr. Brown was present.

Q. Will you give us the conversation. What did you say, and what did Mr. Kaufman and Brown reply.

Mr. Johnston: It is incompetent, irrelevant and

(Testimony of Gerry Horton.)

immaterial, and in no way binding unless it is first shown that this contract here that is introduced in evidence is the subject of [56] the conversation.

Mr. McGugin: Well, we don't know whether it is material, or not, until we find out what the conversation is. We will make it subject to a motion to strike. I will let the testimony go in until we find out whether it is relevant, or not, subject to a motion to strike.

Q. (By Mr. Colby): Give us the conversation, what each of you said.

Q. (By Mr. Johnston): What do you remember, in substance?

A. I don't remember what the conversation was; but generally speaking: I went in to see Kaufman & Brown for the purpose of obtaining money to grow and harvest a crop of potatoes. And after explaining to them the deal I had to offer——

Q. (By Mr. Colby): Can you tell us what you said to them, in substance?

A. Well, in substance, I told them I had so many acres.

Q. How many acres?

A. Well, I explained the total acreage of the Arvin deal and the Shafter deal; told them those acreages were available, and I offered them all, or a part of them, on a basis of an advance of so much money an acre.

Q. Do you remember how much?

A. One hundred dollars; I believe it was the

(Testimony of Gerry Horton.)

amount that was brought up in this hearing. And I believe they asked me [57] what my leases were, and the state of my financial responsibility, and my experience, and so on and so forth. And they indicated interest in what I had to offer and suggested they would give me—no, I believe before I left that night they agreed to take a portion of the deal I offered to them, with an option to take the whole thing the next day, at which time I was to call on them on the next stop of my trip.

Q. Did you call them? A. Yes, I did.

Q. How much time elapsed from the time of your first conversation and the second conversation? A. Just over night.

Q. And did you have a conversation with them?

A. I did.

Q. What was the substance of that conversation?

Q. (By Mr. Johnston): Where was that at?

A. I was in Minneapolis, called Mr. Kaufman, and he said they had decided to take the entire deal, and asked me how I wanted the money to be sent to me, and I gave him the instructions to forward a certain amount—I don't know what it was—to my credit in the California bank. And I told him, or he said what would we do about contracts, and I said I would have them drawn up here and send them back to Chicago for his signature, and so forth and so on.

Q. (By Mr. Colby): All right. At that time, Mr. Horton, [58] was this in reference to the

(Testimony of Gerry Horton.)

Shafter and Arvin lease? Did you have a lease on the Shafter property?

A. Yes, I believe we did.

Q. Was that a term lease? How long a period was that Shafter lease?

A. If I remember correctly, it was a year to year lease with options. No, it was a one year lease with an option for so many more years.

Q. Now, in your conversation with Mr. Kaufman, was there anything said by you or Mr. Kaufman that you were to engage in a partnership in this?

Mr. Johnston That is objected to as incompetent, irrelevant and immaterial; not binding upon us at all. The contract is the best evidence.

Mr. Colby: All right, are you through, counsel? May I direct your Honor's attention to the state of the law as it existed? If a contract is clear, it requires no interpretation. The law is no oral

or parol evidence may be introduced to vary or change its terms. However, if the contract is ambiguous—and here, again, your Honor, it is the cart before the horse—the first thing your Honor will have to decide: Is this an ambiguous contract. It is the respondent's contention that any casual reading or even a careful reading should convince you, sitting there as a Special Master in this case, that this contract is ambiguous. If it [59] is ambiguous, then we are entitled to show the intention of the parties. If it is not ambiguous, then

(Testimony of Gerry Horton.)

this would be incompetent, irrelevant and immaterial, and should be sustained. Therefore, I suggest that the evidence be introduced or offered, and then wait until your Honor determines and rules after your Honor decides our primary question. If your Honor wants any law on it, I have prepared myself for it.

Mr. McGugin: No, I don't think we went to that point of law. I think the objection as made should be overruled first, because I think it does call for a legal conclusion. It doesn't have any weight with me that they had any discussion as to partnership, because that is a legal question, a question of law which, of course, this witness cannot determine.

Mr. Colby: That is right. I am not asking if there was a partnership. I am asking him if he used the words "partner" or "partnership" in his conversation with Mr. Kaufman and Mr. Brown.

Q. (By Mr. Colby): Were those words used?

A. I can't remember that the words were used, but I don't imagine they were.

Mr. Johnson: I object to that as incompetent, irrelevant and immaterial.

Mr. McGugin: It is so ordered.

Mr. Johnson: The answer stands he didn't know what was said or refused to answer. [60]

Q. (By Mr. Colby): Mr. Horton, when you first approached Mr. Kaufman, will you give us, to the best of your knowledge at this time, just

(Testimony of Gerry Horton.)

what proposition did you make him? What did you ask him to do for you?

A. I asked him to advance so much money for the fund of my potatoes.

Q. On land on which you held a lease?

A. Yes.

Q. Did you tell him, in addition to your experience, you had any equipment? A. Yes.

Q. What did you say to him about the equipment you had?

A. I don't know what was said. I simply described the equipment as being sufficient to operate the acreage which I had leased.

Q. Now, during this conversation with Mr. Kaufman, let's take first—the Arvin deal was first, is that correct, or the Shafter deal first?

A. The first what? To harvest?

Q. The first in signing.

A. No, I believe the——

Q. November 16, which deal was that?

A. That would be the Shafter deal.

Q. All right, the Shafter deal was first. Was there any discussion between Mr. Kaufman and yourself as to what interest [61] he was buying from you in this potato crop to be grown?

Mr. Johnston: Your Honor, the same objection to that. The contract speaks for itself. It shows what interest each party was to have, and anybody can interpret that; there is no dispute on that.

Mr. Colby: This was just preliminary, your

(Testimony of Gerry Horton.)

Honor; it is sensible. Let me put it this way—all right, counsel is correct. I was trying to save time.

Q. (By Mr. Colby): I will call your attention to this agreement. You have it there? Paragraph I recites as follows: “First party hereby conveys, bargains and sells to the second parties an undivided forty per cent interest in and to all the potato crops to be planted, raised and harvested upon the above described acreage for the year 1944.” In addition to your discussion as to what interest you were conveying and selling, was there any discussion as to any leases covered by your operations?

A. I don’t remember, of course, just what our conversation was. Wouldn’t that also be contained here?

Q. I am asking you to go back and refresh your recollection.

Mr. McGugin: He is asking about this discussion.

Mr. Johnston: You can answer what you remember back. If you don’t remember it, you don’t remember it.

A. I can’t remember, definitely the discussion as to [62] leases, but I can give you an answer by remembering what I heard passed in this hearing a little while ago in reference to the contract, but I can’t remember myself.

Q. (By Mr. Colby): Let me ask you this: Was it your intention—don’t answer until I finish my question—was it your intention at that time, before

(Testimony of Gerry Horton.)

the execution of this contract on November 16, 1943, to have Mr. Kaufman and Mr. Brown of the Kaufman-Brown Potato Company pay in any losses?

Mr. Colby: Before you answer—you have an objection?

Mr. Johnston: As to what his intentions were isn't competent evidence at all. A man's intention—it is what the conversation was, not what a man intended.

Mr. McGugin: I don't think that is a separate fact. It wouldn't bring about or change any legal relationship. I think the objection is good. I will sustain it.

Mr. Colby: This one case—well, I won't argue the law. I will argue the law later on.

Q. (By Mr. Colby): Now, during the time that you conducted these operations on the Arvin and Shafter deals, this potato crop, were you engaged in any other business during that period of time?

A. Yes, I was engaged in the buying and selling and speculating in potatoes and produce in general.

Q. I see. Of which the Kaufman-Brown Potato Company did not share? [63]

A. They had no share in the outside operations.

Q. All right. After two conversations you testified to, did you come back to California, to Bakersfield?

A. Not immediately afterwards.

Q. Yes, but shortly thereafter?

A. Yes.

Q. And did you hire counsel to draw up the agreements dated November 16, 1943, and January 22, 1944?

A. I did.

(Testimony of Gerry Horton.)

Q. And who was this counsel you retained?

A. Morris Chain of the firm of, the firm of Claflin & Chain.

Q. Did you give Mr. Chain instructions as to what to prepare in the form of an agreement between yourself and the Kaufman-Brown Potato Company?

A. I related the conversation that Mr. Kaufman and I had had, the three of us had, together.

Q. Was it the same as you have just now testified to?

A. Yes, the same conversation that we had. I gave him the structure of our affairs.

Q. Could you tell us now what you gave him?

A. Well, I can sketch it, I guess. I told him that Kaufman & Brown would advance us \$100.00 an acre, and that on all our potato operations—the one operation at Shafter and one at Arvin—I was to supply all the equipment that I had and throwed our leases into the deal for what they were [64] worth and that we were to plant and harvest a crop of potatoes; that on one lease Kaufman & Brown were to get a certain percentage and another lease they were to get a different percentage. And the contracts were drawn, then, on the basis of my instructions to Mr. Chain. I signed them.

Q. Now, just a minute before you go further. Have you given us now all the instructions you gave Mr. Chain concerning the terms of the contracts, of these contracts?

(Testimony of Gerry Horton.)

A. Undoubtedly I haven't given you all the instructions; I gave you the substance.

Q. Yes, have you given us the substance of all of them?

A. Well, let's see, then—generally speaking, yes. If you want me to pin this thing right down to the last word, I will have to refer to the contracts.

Q. I am trying to ask you what you said before the contracts were drawn. We have the contracts before us. What I am trying to arrive at is what was said or done before these contracts were drawn. Did you tell him something about a chattel mortgage? A. Oh, yes.

Q. Now, of course. Let's go back. Wasn't that conversation between you and Mr. Kaufman about a crop mortgage? A. Yes.

Q. What was said by you?

A. They asked me in that conversation what I had to secure [65] their investment, and I told him I had my equipment, which, I believe, at that time was clear; and my reputation, for what it was worth for that type of operation; and, in addition, I was willing to offer them a crop mortgage on the two pieces of land that we were to farm.

Q. Then you came to Bakersfield, and you related that conversation to your attorney; did you not? A. Correct.

Q. That is why these notes and crop mortgages were executed by you? A. Yes.

Q. In your conversation with your counsel, did you tell him that this was to be a partnership

(Testimony of Gerry Horton.)

agreement? Did you use the word “partnership”?

Mr. Johnston: Just a minute. It is leading and suggestive. This isn’t cross-examination.

Q. (By Mr. Colby): I will put it that way. Will you state whether or not you used the words “partner” or “partnership” to your counsel.

Mr. Johnston: It is objected to.

A. Knowing what this contract says, I can’t remember exactly what—the words I did use. I can make it a—guess at it, or tell you what I think.

Mr. Johnston: That is not what they want, is what you remember; if you don’t remember, you don’t remember. [66]

Q. (By Mr. Colby): As a matter of fact, wasn’t it your intention to enter into a partnership, again?

Mr. Johnston: I object again. It is incompetent, irrelevant and immaterial, what his intention was. If I go down and sign a note at the bank and later on say it wasn’t my intention to sign the note—what his intention was doesn’t have anything to do with it. If it is competent—I don’t think it is. It is leading up to the contract. If he comes in here and says what his intention is, that is not competent.

Mr. Colby: If the Court please, if I go to the bank and secure a note, I cannot claim I did not intend to sign a note. But, our Honor, if I sign a memorandum I think is an option and then it turns out to be a mortgage, I have the right, and the authorities so hold, to explain that my inten-

(Testimony of Gerry Horton.)

tions were, if the Court please, was not to give a chattel mortgage or mortgage; it was to give an option. Just giving that as an example, your Honor. And that is why the intention of these parties is vital to a determination, particularly, your Honor. This isn't in dispute between the two parties to the contract; there is no dispute between them as individuals. This is a third party coming in, to wit: creditors in a bankruptcy; an attempt by them, also, to ask your Honor to determine the intentions of the parties, by this contract that they intended to be partners, and, therefore, they are liable. That is what your Honor will have to decide, and, therefore, [67] it is necessary to ask them what is in the minds of these parties. Did their minds meet? Was there an agreement in their minds as evidenced by writing? I think it is important for your Honor to hear what was the intention of the parties.

Mr. Johnston: I think it is taking away from the Court. I put in an objection. It is incompetent, irrelevant and immaterial. It is leading and suggestive. And, furthermore, it is deciding something that the Court should decide. Asking what his intention was at the time! He entered into an agreement. It is for the Court to determine whether they were partners; and we can't go out and ask people what their intention was at the time they signed the contract, was their intention to do this, or intention to do that. It was what was said and done by the parties, if that is competent, plus what is in the contract, leading up to it.

(Testimony of Gerry Horton.)

Mr. McGugin: I think the objection is good.

Mr. Colby: I will accept your Honor's ruling.

Mr. McGugin: I will sustain it.

Mr. Colby: There is no exception now necessary to a ruling?

Mr. McGugin: No.

Q. (By Mr. Colby): Now, Mr. Horton, was there anything said in your conversation with Mr. Kaufman concerning what he was to do after the potatoes were grown and shipped to him? Was there anything said about that? [68]

A. Yes.

Q. What was said? What did he say, and what did you say? A. Generally, he wanted——

Q. What did he say, please?

A. I can't remember exactly what he said.

Q. Not exactly, but the substance.

A. The substance of our conversation was this: He asked me if he could handle all the potatoes he was interested in, and I told him so far as I was concerned he could have first option to buy any or all the potatoes we produced, at the prevailing market, and I believe he accepted that.

Q. What did he say? He said that—what did he say? He didn't use the word "accepted"?

A. No.

Q. What did he say?

A. He said that would be all right, if I would pay him a fee for handling each sack we shipped there the same as he would if he bought stuff from somebody else; so I agreed to do that, and I thought

(Testimony of Gerry Horton.)

that was all right; that was part of our agreement as well.

Q. Did you narrate the substance of that conversation to your counsel to put into this contract?

A. Yes.

Q. And that is why there is a paragraph VIII making a provision for that? [69]

A. That is right.

Q. Did you ship any potatoes to Mr.—to the Kaufman-Brown Company after they were harvested? A. Yes.

Q. Did they pay you for them? A. Yes.

Q. Did they withhold or deduct from the potatoes you shipped any of the advances they made?

A. No, I don't believe they did.

Mr. Colby: There is in evidence here, your Honor, and I don't know where they are, the various drafts and checks. Is that in here?

Mr. Johnston: I think that is in there.

Mr. Kendall: They were introduced for identification. I think they should be introduced for——

Mr. Colby: That was what I was thinking. Here they are.

Q. (By Mr. Colby): I will show you a series of drafts, totaling 42,594.82, marked Respondent's Exhibit "B" for Identification on a prior hearing. Do you know of your own knowledge whether that represents the amount of the advances by the Kaufman-Brown Potato Company on these two deals? A. You mean the entire amount?

Q. Yes.

(Testimony of Gerry Horton.)

A. No, I don't know for certain just what it represents. It probably represents the advances, as well as—wait a [70] minute. That is how much? What was the total amount?

Q. 42,594.82.

A. Let me examine the drafts. (Examines exhibit.) Of course, these checks, or these drafts—or they are checks, don't specifically refer to either one of my companies. I imagine they are.

Mr. Kendall: We should read into the record.

Mr. Johnston: I don't think there is any dispute on those things.

Mr. Colby: I was just laying a foundation here. If you will stipulate to that—

Mr. Kendall: We proved it that time, and they weren't introduced in evidence.

A. Are they introduced in evidence?

Mr. Johnston: There wasn't any dispute as to the amount. He testified that the chattel mortgage was all paid off.

Mr. Colby: You did?

Mr. Johnston: Yes, he did. It is in the record.

Mr. Colby: I don't recall it.

Mr. Johnston: The chattel mortgage was paid off; that is what he testified to.

Mr. Kendall: And there was an unsecured claim for the balance. "We received back \$20,000.00." And he claims for the difference. Page 31 of the transcript. Here is the theory of that. Maybe I can explain that to you, Sam; you [71] remember the time. Our claim is filed on certain checks that

(Testimony of Gerry Horton.)

were issued to us. There were checks given in payment of the crop mortgage they never claimed.

Mr. Johnston: That is here in——

Mr. Kendall: That was merely to show our total advancements.

Mr. Johnston: You look at your claim, and it shows that there is one for eight hundred and some odd dollars.

Mr. Kendall: Before we get off on a tangent, may we have those introduced in evidence instead of just for identification?

Mr. Johnston: I don't think they have anything to do with it. If you explain what you want to——

Mr. Kendall: Yes, we want to show the total advances made; in other words, the checks that were issued to us on which our claim is based on. We were ordered to support our claim here on an order to show cause, and in answer to it we brought in these checks.

Mr. Johnston: We spent a lot of time arguing, Mr. Kendall; as against the Company, we have but one claim: that is the overdraft of Gerry Horton. The remainder of the claim arises from the farming of the farm. Here is the check right there. If you want to introduce those, those total your amount. They are already in. There is the claim right there: The Gerry Horton Company, that is one check; the other checks are on the farm. Those checks, I don't think, have anything [72] to do with it.

Mr. Kendall: I think it is material, still, and

(Testimony of Gerry Horton.)

I would like to have them introduced there to show we paid off the money, to substantiate our claim.

Mr. Johnston: We already have that in here. There is no objection to their claim as to the amount. Those checks are there.

Mr. Colby: Is it stipulated that Kaufman & Brown turned over a certain sum to Mr. Gerry Horton?

Mr. Johnston: I don't know what the sum is. If we go into that, we will be here a week. They claim a certain amount of money, and that is the only claim here. One is against Gerry Horton Company, and the other is Gerry Horton Farms. We have already stipulated in the record your claim of 884.97 is a claim against the Compan. I said there was no objection. Now, the other creditors are checks on Gerry Horton Farms.

Mr. McGugin: Now, that is the basis of their claim they filed in bankruptcy?

Mr. Johnston: We are not objecting to the amount. We are objecting to the checks. They are not entitled to participate in the dividends as against other creditors if they are partners.

Mr. McGugin: I understand that. Now, the basis—did these checks not establish the actual transfer of the money from Horton to Kaufman & Brown? [73]

Mr. Kendall: I say those checks show money paid in by us for the growing of that crop and are the consideration for the return of the advances.

Mr. Johnston: I am going to object to them as

(Testimony of Gerry Horton.)

immaterial. If he wants to accept them, it is all right.

Mr. McGugin: We will receive them in evidence.

Mr. Colby: May I proceed now?

Mr. McGugin: Yes, you may proceed.

Q. (By Mr. Colby): Mr. Horton, I show you a check dated July 4, 1944, paid to the order of Kaufman-Brown Potato Company in the sum of 7,594.82, signed Gerry Horton Farms by Gerry Horton. Is that your signature on the check?

A. Yes.

Q. Do you recall this check? A. Yes.

Q. Whose handwriting is this check in?

A. I don't know whose handwriting the check is in.

Q. I call your attention—is that your bookkeeper or accountant?

A. Undoubtedly the bookkeeper.

Q. Yes. I draw your attention to the notation in the upper left-hand corner of the check, as follows: "On loan, 7,594.82." Was that notation on check at the time you signed it? A. Yes.

Q. I draw your attention—by the way, this check was never made good; was it? A. No.

Q. You did not have funds in the bank at that time? A. We did not.

Q. I show you another check—

A. We didn't have funds in the bank at the time the check was presented.

Q. That is right—check 723, dated July 12, 1944, payable to Kaufman-Brown Potato Company,

(Testimony of Gerry Horton.)

in the amount of \$5,000.00; upper left-hand corner,
“On loan: 5,000.”

Mr. Johnston: All this testimony isn't binding upon any of the creditors.

Mr. Colby: What? It is for the Court——

Mr. Johnston: It is for the Court to determine; but this particular line of questioning, what someone wrote on a check, wouldn't bind the creditors so far as the partnership agreement is concerned. I want my objection.

Mr. McGugin: That doesn't determine the legal—necessary legal status or relationship of the parties at all.

Mr. Johnston: No.

Mr. Colby: Your Honor, you will have to determine that from all the evidence.

Q. (By Mr. Colby): I will show you that check. It wasn't cashed or made good? [75] A. No.

Q. I will show you another check, July 12, \$5,000.00, same notation, “On loan.” Is that your signature on that check? A. It is.

Q. And that check was never made good; was it?

A. That is right.

Q. Now, I show you another check, July 12, 1944, and \$5,000.00, with a similar notation, “On loan.” Is that your signature on that check?

A. Yes.

Q. And that check was never made good; was it?

A. No.

Q. Now, Mr. Horton, the most part of the afternoon you identified certain creditors' claims that

(Testimony of Gerry Horton.)

would apply to, thought would apply to, the potato deal. You recall most of them? Have you got the list there? Let's take the one for the Pacific Gas & Electric Company. Did you have dealings with this company prior to November 16, 1943?

A. Yes.

Q. On other operations? A. Yes.

Q. Now, at the time you started on the operations, what we called all afternoon "the potato deal," did you make application for this company for credit for the use of electricity? [76]

A. Yes, we must have. An application is necessary for each new place.

Q. In this application did you mention that you were a partner with Kaufman-Brown Potato Company?

Mr. Johnston: Just a minute. That is incompetent, irrelevant and immaterial, what he mentioned to some creditor.

Mr. McGugin: I think the objection is probably good. I don't see any relevancy in it or how that would affect the legal relation, whether or not he mentioned that fact.

Mr. Colby: Except the reliance of these creditors it was and shows they are relying upon this contract that we are partners; or is this an afterthought by counsel in the midst of a bankruptcy that so and so were partners? In other words, when he purchased this contract, there is a balance of \$2,254.00, he went into the Pacific Gas & Electric and told them, "I want you to know, I want you to understand, Kauf-

(Testimony of Gerry Horton.)

man & Brown of Chicago"—maybe a million dollar concern, by the way of argument—"is my partner in my deal," and he was extended credit relying on that; that would be one theory to hold they were, and I am trying to substantiate by the evidence there was no such representation.

Mr. McGugin: I don't think if he did make such a representation it wouldn't have established a partnership; and whether he made that, or not, I really don't see any relevancy. I sustain the objection.

Mr. Colby: I will accept the ruling. And may I ask one question, generally, and also accept your Honor's ruling on any of these creditors?

Q. (By Mr. Colby): Did you make the statement that Kaufman & Brown Potato Company were partners with you in these ventures?

Mr. Colby: Same objection?

Mr. Johnston: Same objection: incompetent, irrelevant and immaterial.

Mr. McGugin: Sustained.

Mr. Colby: There was introduced in evidence here a note and chattel mortgage on certain equipment to the bank. I have forgotten the name of the bank.

Mr. Kendall: Kern County Bank.

Mr. Colby: Kern County Bank.

Q. (By Mr. Colby): Did you make an application with the bank for credit at the time you secured that loan? A. Yes.

Q. Did you at that time make a statement to

(Testimony of Gerry Horton.)

the bank, either orally or in writing, that Kaufman-Brown Potato Company were your partners?

Mr. Johnston: I object to that as incompetent, irrelevant and immaterial; no way binding upon the Trustee or any of the creditors.

Mr. McGugin: Same ruling. [78]

Q. (By Mr. Colby): At that time did you have another loan with the bank?

Mr. Johnston: That would be immaterial, whether he had other loans, or not.

Mr. McGugin: How do you feel that would be material?

Mr. Colby: To show that the course of dealing, that credit was extended to him personally and not to the Kaufman-Brown Potato Company.

Mr. Kendall: It is our position in regard to that claim, definitely, your Honor. He went out and borrowed money which he put into this venture. It wouldn't make us liable. It wouldn't take a third person to follow that money into that venture. In other words, he went to the bank on his own credit and got money; he had certain obligations with them, and the bank wasn't looking to this venture, they were looking to him, and they took a mortgage on his property the same as he made other loans. And I think it is material to show he had credit and got it on his own credit. It is evidence. We sold certain of his property and sold it to the Kern County Bank. We got a lien out of it.

(Testimony of Gerry Horton.)

Mr. Johnston: I still say it is immaterial; that doesn't mean anything, the other loan he had.

Mr. Colby: It shows he had credit with the bank.

Mr. McGugin: Whatever line of credit he had, it wouldn't make any difference. Suppose you and I went into partnership [79] and I have a line of credit at the bank which I established by previous dealing with the bank; and after we go into partnership I go down to the bank and borrow more money, would it make a difference in the partnership whether they loaned it to because of previous dealings or whether they loaned it to me as a member of the partnership?

Mr. Kendall: If they loaned it to you as a member of the partnership, that would be one thing. But here we have nothing but evidence of an individual loan, which loan was made——

Mr. McGugin: I think if they made a loan to me and I was a partnership member, whether they realized it or not, however, it was for the purposes of the parties, it would be a partnership debt.

Mr. Kendall: This can be off the record.

Mr. Colby: (After further discussion.) I will accept your ruling on that.

Mr. McGugin: Yes, I think the objection is good.

Q. (By Mr. Colby): Did you make an assignment of any of the leases to the Kaufman-Brown Potato Company? Did you assign any interest to those leases to them?

(Testimony of Gerry Horton.)

Mr. Johnston: Just a minute.

Mr. Colby: You asked him that question yourself.

Mr. Johnston: Outside these contracts? You mean outside these contracts?

Mr. Colby: Outside of which contract? That speaks for [80] itself. In addition to that.

Mr. Johnston: I have no objection to that.

A. No, I did not assign. I did not get your question correctly. I didn't assign anything having to do——

Q. (By Mr. Colby): You were the owner of the those leases at all times during operation of the potatoes? A. That is right.

Q. Did you transfer, by bill of sale or otherwise, any of the equipment to the Brown Potato Company? A. No.

Q. Or to the Brown Potato Company and Alt-house and Horton as a partnership, did you make any transfers? A. No, I didn't.

Q. Did Mr. Kaufman or Mr. Brown ever participate in the matter of the operation of the two potato crops at Shafter and Arvin?

Mr. Johnston: Now, just a minute. It is leading and suggestive, calling for conclusion. And what did they do?

Mr. Colby: I will say "whether or not they participated."

Mr. Johnston: That is leading and suggestive.

Mr. Colby: Not with respect to whether or not.

(Testimony of Gerry Horton.)

He can answer one way or the other.

Mr. Johnston: What is participating calls for a conclusion of the witness.

Mr. Colby: If he answers, he can say, "No, they didn't [81] do anything"; the question is all answered.

Mr. McGugin: I think the question is leading and suggestive. If you will reframe the question.

Mr. Colby: All right.

Q. (By Mr. Colby): You stated that Mr. Brown and Mr. Kaufman came out to California. Will you tell us what they did in connection with your farming operations on the Shafter and Arvin properties?

A. That is right. Yes, they came out to survey the operation, its progress, and they had certain recommendations to make as to when we would start digging the potatoes, because it was naturally of interest to them; and they had men helping them around the warehouse. It was a matter of them having interest in my operations and wanted to see that they were well taken care of, I guess.

Q. Did they hire any of your help?

A. Beg your pardon?

Q. Did they hire any of your help?

A. No.

Q. Did they fire any of your help?

A. No.

Q. Did they buy any material for your operations, any of the supplies?

(Testimony of Gerry Horton.)

A. You mean did they sign the order for that, or did they pay for them? [82]

Q. Did they buy any of it for the operation, themselves?

A. No. I bought all the materials used in the operations.

Q. You were the manager all the way through, all through this deal, were you not?

A. That is correct.

Q. Did they interfere any way whatever in your management of these operations?

A. No.

Q. Did they have any right to sign checks on the bank account of the operation on the potato deal?

A. No.

Q. When they paid you for those cars of potatoes that were shipped to Chicago, what did you do with those proceeds?

Mr. Johnston: Which did they pay?

Mr. Colby: He testified on your examination first carloads of potatoes were shipped, or maybe under my examination.

Mr. Johnson: To which Company?

Mr. Colby: To the Brown Potato Company, to the Kaufman-Brown Potato Company.

Mr. Johnston: They were shipped by which company? One is the Company, and one is the Farm.

Mr. Colby: I am only interested in the Farm.

Q. (By Mr. Colby): The Farm shipped some potatoes?

A. They could have.

(Testimony of Gerry Horton.)

Q. Don't you know that you did? [83]

A. The Company is supposed to be the shipping organization; the Farm is the growing organization.

Q. I am not interested in that. The Farm Company had the lease and raised these potatoes.

A. That is right.

Q. And when you shipped them, who shipped them? Whose potatoes were they?

A. They were owned by the Farm, Gerry Horton Farms.

Q. Well, of course, Althouse was your partner in farming ventures. It wasn't any different, except in name. Is that right?

A. That is right.

Q. All right. When you shipped those potatoes, pursuant to your contract, you received checks for them. What did you do with that money?

A. It was deposited to either the account of the Farms or the Company; I don't know which.

Q. What did you do with them, then? Your harvest had ceased for that time. What did you do with those farms?

A. Not necessarily, the harvest had not ceased. As potatoes were done, they may be sold over a period of sixty days; we might continue digging for sixty days.

Q. How were they sold; over what period?

A. They were probably sold over a period of thirty to forty-five days. [84]

(Testimony of Gerry Horton.)

Q. And as this money came in for these various carloads of potatoes,—

A. Uh-huh.

Q. —and you deposited it to your account,—

Mr. Johnston: Now, wait a minute. Show him these checks if you are asking him about them.

Mr. Colby: Wait a minute.

Mr. Johnston: Which account are you talking about? There are two shipments of potatoes. Which are you talking about, the Company's or the Farm's? Refer to it so they will know what you are talking about.

Mr. Kendall: To clarify it: All you did was take the Farm material and ship them through the Company.

Q. (By Mr. Colby): There was only one shipment, only from the Farm; is that true?

A. There are two businesses on record there.

Q. We know that. Did the Horton Company buy potatoes from other farms and shippers and ship them under that deal?

A. Not under that deal. No. It is the practice of Gerry Horton Company to buy, ship and sell potatoes, both from other growers,—

Q. Did they do so during the operations of the Shafter-Arvin deal to the Kaufman-Brown Potato Company?

A. I can't testify correctly as to that, because it is quite possible we did on their request. We acted as their [85] agents in a good many cases when they

(Testimony of Gerry Horton.)

were unable to buy from other growers. We many times bought them under the name of Gerry Horton Company and shipped them to them. And that might have happened during this period of time. I can't testify for sure.

Q. Then your operations, Mr. Horton, were concluded, and you sold all your potatoes. What did you find happened to these two potato deals, this Arvin and Shafter deal? Did you find there was a loss? A. We found there was a loss.

Q. How much was the loss?

A. I don't know. It was inconsequential on the Shafter deal.

Q. What do you mean by "inconsequential"?

A. It was practically a break-even deal; in fact, I think a few dollars were gained by the Shafter deal.

Q. All right.

A. And we had a very close—I believe it was a total loss on the Arvin property.

Q. What do you mean by "total loss"? How much was that?

A. Well, let's see. I guess, roughly, from twenty to twenty-five thousand dollars, something like that.

Q. During the operation of these two potato crops on the Shafter and Arvin deal, you withdrew money from this bank account, from both bank accounts, did you not, for living [86] expenses?

A. Yes.

Q. And did you engage in any other business

(Testimony of Gerry Horton.)

ventures or operations? Did you buy anything during that period of time; substantially, I mean?

A. Yes, we were buying for other accounts. I mean having nothing to do with Kaufman & Brown. It is quite possible we did.

Q. You don't understand. Did you use any of the money that was advanced by Kaufman & Brown Potato Company for other ventures? A. No.

Q. Did you deposit it in the second account you had? You only had two checking accounts, didn't you? A. No, we had three.

Q. What was the name of the third checking account? A. It was in a different bank.

Q. But it was in the same name, the name of the two firms? As a matter of fact, you changed funds from one bank to the other bank, did you not? A. That is correct.

Q. There was one check of a thousand dollars that you identified that was not used by the Farms Company, that was paid by the Farms Company to the Horton Company for deposit?

A. Yes. [87]

Q. You don't know what that was for?

A. No, I can't recall.

Q. And do you know there was any other sums likewise used in that manner?

A. Undoubtedly. We had, continually, necessity for transferring from one Company to the other. Sometimes it would be transferred to the Farms, and sometimes in favor of the Company.

(Testimony of Gerry Horton.)

Q. When it came to the shipment of potatoes to Kaufman-Brown Potato Company, did either Mr. Kaufman or Mr. Brown have any voice in what potatoes were to be shipped, which potatoes there were to be shipped? A. Yes.

Mr. Johnson: Go ahead.

A. In fact, they had the entire voice in that matter. They selected the ones they wanted, and it was their option to which they took them or not.

Q. (By Mr. Colby): Yes. It was their option as to which they wanted? A. Yes.

Mr. Colby: That is all of this witness.

Cross-Examination

By Mr. Johnston:

Q. Mr. Horton, you don't remember all the conversation you had back in Chicago with Mr. Kaufman and Mr. Brown, do you?

A. No, only just what I referred to a little while ago. [88]

Q. And you don't remember all the conversation you had over the telephone from Minneapolis, do you? A. No, I don't believe I did.

Q. You don't remember all the conversation you had with your attorney, Mr. Chain, when you came back and asked him to prepare this agreement that is introduced in evidence, Defendant's Exhibit "E"? A. No.

Q. But what you told Mr. Chain to put in the contract was based upon what your agreement was

(Testimony of Gerry Horton.)

with Mr. Brown and Mr. Kaufman back in Chicago?

Mr. Colby: Just a moment. That is asking, introducing matter not in evidence; your Honor will hear the question as told the reporter.

Mr. Johnston: Read it.

(Question is read by reporter.)

Mr. Johnston: I will change it.

Q. (By Mr. Johnston): What you told Mr. Chain was what your conversation was back in Chicago, was it? A. Yes.

Q. With Mr. Kaufman and Mr. Brown?

A. Yes.

Q. Then Mr. Chain prepared this contract, and you sent it back to Mr. Brown and Mr. Kaufman after you had read it? A. Yes. [89]

Q. And then you and your partner signed it?

A. Yes.

Q. Now, then, after that contract was entered into, you went into this deal out at Arvin, didn't you?

A. Well, they were all decided on at the same time; but for some reason or other there is a difference in the date of our contracts.

Q. Well, one of them had to be corrected on account of the acreage; isn't that it?

A. That is right.

Q. And that was dated later?

A. That is right.

Q. And when you related your conversation to

(Testimony of Gerry Horton.)

Mr. Brown—or to Mr. Chain, it dealt with the conversation that you had had with Mr. Kaufman and Mr. Brown as to both contracts, didn't it?

A. That is right.

Q. Now, Mr. Colby asked you if you were in any other kind of business, and you said you were buying and selling. Now, the buying and selling was handled by the Company and not by the Farm?

A. That is correct.

Mr. Johnston: I think that is all.

Mr. Colby: That is all, your Honor. [90]

State of California,
County of Kern—ss.

I, Virginia Dieter, hereby certify that I, as official reporter, was present and correctly took down in shorthand all the testimony given and proceedings had in the foregoing-entitled matter on the 8th day of December, 1947; and I further certify that the annexed and foregoing is a full, true and correct statement of such testimony and proceedings, and a full, true and correct transcript of my said shorthand notes thereof.

Bakersfield, California, December 12, 1947.

/s/ VIRGINIA DIETER,
Official Reporter.

[Endorsed]: Filed July 22, 1948, U.S.D.C.

[Endorsed]: Filed Oct. 31, 1949, U.S.C.C. [91]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 145, inclusive, contain the original Involuntary Petition by Three Creditors; Order of General Reference; Order of Adjudication of Bankruptcy and Order for Filing of Schedules in Bankruptcy; Certified Copy of Order Approving Trustee's Bond; Petition for Order Amending, Modifying and Changing Order of Adjudication and Petition for Order to Show Cause Directed Against Partners; Order to Show Cause; Answer to Order to Show Cause; Stipulation; Referee's Memorandum of Opinion; Findings of Fact and Conclusions of Law; Order; Petition for Review; Certificate by Referee to Judge on Order Modifying Adjudication to Include Kaufman-Brown Potato Company as one of the General Partners of Gerry Horton Farms; Order Affirming Order of Referee re Adjudication; Proof of Unsecured Debt and Letter of Attorney of Kaufman, Brown Potato Company; Objection to Claim of Kaufman-Brown Potato Company; Order to Show Cause; Findings of Fact and Conclusions of Law as to Kaufman-Brown Potato Company Claim; Order; Petition for Review; Certificate by Referee to Judge on Order Disallowing Claim of Kaufman-Brown Potato Company in Part; Order Affirming Order of Referee re Claim

of Kaufman-Brown Potato Company; Notice of Appeal filed August 24, 1949; Notice of Appeal from Order re Adjudication; Notice of Appeal from Order re Claim of Kaufman-Brown Potato Company; Statement of Points Upon Which Appellant Will Rely Upon Appeal from Order re Adjudication; Statement of Points Upon Which Appellant Will Rely Upon Appeal from Order re Disallowance of Claim; Statement of Points Upon Which Appellants Will Rely Upon Appeal Filed August 24, 1949; Order Extending Time to File Record and Docket Appeal; Designation of Record on Appeal; Amended Statement of Points Upon Which Appellant Will Rely Upon Appeal from Order re Disallowance of Claim; Amended Statement of Points Upon Which Appellant Will Rely on Appeal Filed August 24, 1949; Amended Statement of Points Upon Which Appellant Will Rely on Appeal from Order re Adjudication and Three Affidavits of Service and a full, true and correct copy of Minute Order entered July 25, 1949, which, together with original Respondents' Exhibits A, D and E and Reporter's Transcript of Proceedings on March 21, 1947, December 8, 1947, and May 12-13, 1947, transmitted herewith, constitute the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 28th day of October, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12390. United States Court of Appeals for the Ninth Circuit. Kaufman-Brown Potato Company, a Partnership, Composed of Charles H. Kaufman and Albert H. Brown, Charles H. Kaufman and Albert H. Brown, Appellants, vs. Wayne Long, as Trustee in Bankruptcy of the Estates of Gerry Horton and J. D. Althouse, Doing Business as Gerry Horton Company, a Co-Partnership; Gerry Horton and J. D. Althouse, Doing Business as Gerry Horton Farms, a Co-Partnership; Gerry Horton, an Individual, and J. D. Althouse, an Individual, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Northern Division.

Filed October 31, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12390

In the Matter of

GERRY HORTON and J. D. ALTHOUSE, Doing Business as GERRY HORTON COMPANY, a Copartnership; GERRY HORTON and J. D. ALTHOUSE, Doing Business as GERRY HORTON FARMS, a Copartnership; GERRY HORTON, an Individual, and J. D. ALTHOUSE, an Individual,
Bankrupts.

CONCISE STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD NECESSARY FOR CONSIDERATION THEREOF AND TO BE PRINTED (APPEAL FROM JUDGMENT ENTERED IN JUDGMENT BOOK 5, PAGE 258, RE ADJUDICATION IN BANKRUPTCY)*

CONCISE STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD NECESSARY FOR CONSIDERATION THEREOF AND TO BE PRINTED (APPEAL FROM JUDGMENT ENTERED IN JUDGMENT BOOK 5, PAGE 271, RE DISALLOWANCE OF CLAIM)*

CONCISE STATEMENT OF POINTS ON AP-
PEAL AND DESIGNATION OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF AND TO BE PRINTED (AP-
PEAL FILED AUGUST 24, 1949)*

[*Three separate documents — Title of Court, Cause, Number, Filing Date and the following copy are identical in each.]

To the Honorable United States Court of Appeals
for the Ninth Circuit:

For their concise statement of points on appeal on which the appellants intend to rely, the appellants, and each of them, adopt the amended statement of points heretofore filed with the Clerk of the United States District Court for the Southern District of California, Central Division.

The Appellants hereby designate the entire record on appeal certified by the Clerk of said United States District Court with the exception hereinafter noted, as necessary for the consideration of the appeal in this cause and to be printed. The said exception is as follows:

Exhibits "A," "B," "C," "D" and "E" to the Petition for Order Amending, Modifying and Changing Order of Adjudication and Petition for Order to Show Cause directed against partners, shall not be printed, said exhibits being contained in pages 18 to 37 of said record on appeal, and in lieu thereof this statement shall be printed, to wit:

“Exhibit ‘A’ to this Petition, being a copy of the involuntary petition in bankruptcy, is not here set forth in that the original thereof is contained in the said record on appeal, pages 18 to 24, thereof;

“Exhibit ‘B’ to this Petition, being a copy of Order of References, is not here set forth in that the original thereof is contained in the said record on appeal at page 25, thereof;

“Exhibit ‘C’ to this Petition, being a copy of the Order of Adjudication of Bankruptcy and Order for Filing of Schedules in Bankruptcy, is not here set forth in that the original thereof is contained in the said record on appeal at page 25, thereof;

“Exhibit ‘D’ to this petition, being a copy of Agreement dated the 22nd day of January, 1944, is not set forth in that the original thereof is contained in the said record on appeal as respondent’s ‘Exhibit D’; and

“Exhibit ‘E’ to this petition, being a copy of Agreement dated the 16th day of November, 1943, is not set forth in that the original thereof is contained in the said record on appeal as respondent’s ‘Exhibit E.’ ”

The within document is to be printed as part of the record, in addition to those items already designated; all filing stamps shall appear in the printed record, but the titles of the Court and the cause, and

the names and addresses of attorneys appearing above the captions shall be omitted in printing.

Dated: This 28th day of October, 1949.

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

[Endorsed]: Filed Oct. 31, 1948.

[Title of Court of Appeals and Cause.]

ORDER CONSOLIDATING APPEALS FOR
PRINTING, BRIEFING AND HEARING
PURPOSES

A stipulation by and between the Appellants and Appellees in the hereinafter described appeals having been filed wherein it is stipulated that this Order may be made, and the Court having considered said stipulation, and good cause appearing therefor,

It Is Hereby Ordered that the following appeals, to wit:

(a) Appeal filed August 24, 1947, from Order of United States District Court for the Southern District of California;

(b) Appeal from Order of United States District Court for the Southern District of California, entered in Judgment Book 5, Page 258, re Adjudication in Bankruptcy, and

(c) Appeal from Order of United States Dis-

trict Court for the Southern District of California, entered in Judgment Book 5, Page 271, re Disallowance of Claim,

be and the same are hereby consolidated for printing, briefing and hearing purposes.

Dated: This 8th day of November, 1949.

/s/ WILLIAM DENMAN,

/s/ HOMER T. BONE,

/s/ WM. E. ORR,

Judges of the United States
Court of Appeals.

[Endorsed]: Filed Nov. 8, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION THAT APPEALS MAY BE
CONSOLIDATED FOR PRINTING,
BRIEFING AND HEARING PURPOSES

Whereas, appeals are now pending in the above-entitled Court, as follows:

(a) Appeal filed August 24, 1949, from Order of United States District Court for the Southern District of California;

(b) Appeal from Order of United States District Court for the Southern District of California, entered in Judgment Book 5, Page 258, re Adjudication in Bankruptcy.

(c) Appeal from Order of United States District Court for the Southern District of California, entered in Judgment Book 5, Page 271, re Disallowance of claim, and

Whereas, the appeals have designated the same portions of the records, proceedings and evidence to be contained on the record on appeal in each of said appeals, and

Whereas, it appears that the issues to be determined in connection with said appeals are primarily of like nature,

Now, Therefore,

It Is Hereby Stipulated and Agreed by and between the Appellants and the Appellees, by their respective counsel, that an Order may be made by the above-entitled Court consolidating the said three appeals for printing, briefing and hearing purposes.

Dated: This 5th day of Nov., 1949.

/s/ SAMUEL C. COLBY,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellants.

HARVEY, JOHNSTON,
BAKER & PALMER.

/s/ C. W. JOHNSTON,

Attorneys for Appellees.

[Endorsed]: Filed Nov. 8, 1949.

No. 12390

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KAUFMAN-BROWN POTATO COMPANY, a Partnership
composed of Charles H. Kaufman and Albert H.
Brown, CHARLES H. KAUFMAN and ALBERT H.
BROWN,

Appellants,

vs.

WAYNE LONG, as Trustee in Bankruptcy of the Estates
of Gerry Horton and J. D. Althouse, doing business
as Gerry Horton Company, a Co-Partnership; Gerry
Horton and J. D. Althouse, doing business as Gerry
Horton Farms, a Co-Partnership; GERRY HORTON, an
individual, and J. D. ALTHOUSE, an individual,

Appellees.

BRIEF FOR APPELLANTS ON CONSOLIDATED APPEALS.

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IN THE
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Appellees.

**BRIEF FOR APPELLANTS ON
CONSOLIDATED APPEALS.**

Preliminary Statement as to Three Appeals.

Pursuant to order of this Court, three appeals, to wit:

- (a) Appeal filed August 24, 1947, from Order of
United States District Court for the Southern
District of California;

- (b) Appeal from Order of United States District Court for the Southern District of California, entered in Judgment Book 5, page 258, re Adjudication in Bankruptcy, and
- (c) Appeal from Order of United States District Court for the Southern District of California, entered in Judgment Book 5, page 271, re Disallowance of Claim,

were consolidated for printing, briefing and hearing purposes. Said consolidation was for the reason that there was the same designation of the records, proceedings and evidence to be contained on the record of appeal in each of said appeals, and also that the issues to be determined in connection with said appeals are primarily of like nature.

In the Bankruptcy proceedings in which said appeals arose, upon a petition for order amending, modifying and changing order of adjudication and upon an objection to the claim of Kaufman-Brown Potato Company, a Partnership, two orders were made by the Referee in Bankruptcy adverse to the appellants herein. Petitions for review were filed and duly heard and taken under submission by the Honorable Judge of the United States District Court.

Thereafter, on July 25, 1949, a Minute Order was entered affirming the order of the Referee, as amended,

which Minute Order did not specifically state which order of the Referee was affirmed. Thereafter, on August 29, 1949, two written orders were signed by Honorable C. E. Beaumont, Judge of the District Court, affirming respectively the order of the referee in respect to the modification of adjudication and the order respecting the objection to claim of Kaufman-Brown Potato Company, a Partnership.

In that the written orders were filed and entered more than thirty (30) days after the date of the Minute Order, appellants on August 24, 1949, and prior to the filing of the entry of the written orders, filed an appeal from the said Minute Order because of the possibility that such Minute Order might be considered to be a Final Order. After the written orders were signed, filed and entered, appeals were duly taken from each of said orders.

Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

It is contended that the U. S. District Court had jurisdiction by virtue of the provisions of Section 2A-1, Section 2A-10, and Section 5 of the Bankruptcy Act.

(a) The United States Court of Appeals for the Ninth Circuit has jurisdiction to hear the appeals by virtue of Sections 24A and B and Section 25 of the Bankruptcy Act. The appeals are taken pursuant thereto and pursuant to Rules 73 and 75 of the Federal Rules of Civil Procedure.

(b) The pleadings necessary to show the existence of the jurisdiction are as follows:

Petition for Order amending, modifying and changing order of adjudication and petition for Order to show cause directed against partners, filed by Wayne Long, Trustee of the Bankrupts [Tr. pp. 14-22];

Answer to Order to Show Cause, filed by Kaufman-Brown Potato Company, a Partnership [Tr. pp. 26-29];

Petition for Review of Kaufman-Brown Potato Company, a Partnership, and its partners, from Order of Referee amending and modifying the Order of Adjudication [Tr. pp. 49-54];

Proof of Unsecured Debt, filed by Kaufman-Brown Potato Company;

Objection to claim of Kaufman-Brown Potato Company, filed by Wayne Long, Trustee of the Bankrupts [Tr. p. 85];

Petition for review of Order of Referee in reference to claim of Kaufman-Brown Potato Company, filed by Kaufman-Brown Potato Company, a partnership, and its partners [Tr. pp. 93-97];

Notice of Appeal from Minute Order filed August 24, 1949 [Tr. p. 109];

Notice of Appeal filed September 22, 1949, from Order entered in Judgment Book 5 at page 258 [Tr. p. 110];

Notice of Appeal, filed September 22, 1949, from Order entered in Judgment Book 5 at page 271 [Tr. p. 111].

(c) Facts are those set forth in next sub-division.

Statement of the Case and Questions Presented.

In October and November of 1943, Gerry Horton, one of the co-partners of Gerry Horton Company, a co-partnership composed of said Gerry Horton and J. D. Althouse, and also one of the co-partners of Gerry Horton Farms, a co-partnership composed of the same two individuals, went to the office of Kaufman-Brown Potato Company in Chicago, Illinois, and talked to Charles H. Kaufman and Albert H. Brown, co-partners of Kaufman-Brown Potato Company [Tr. pp. 145-247]. In the conversation Horton requested Kaufman-Brown Potato Company to finance a growing deal on some land at Shafter on which Gerry Horton Farms held a lease [Tr. pp. 145, 252]. Details of such financing were discussed to the effect that Kaufman-Brown Potato Company was to put in the necessary money to bring the crop up to harvest and, in return, was to receive a percentage of the deal with the privilege of buying the potatoes at market price and was to be given a crop mortgage as security [Tr. pp. 146, 256, 259]. As a result of this conversation, and a telephonic conversation the next day between Horton and Kaufman (Horton being then in Minneapolis) Kaufman stated that his company would take the deal [Tr. p. 249]. Horton stated that he would have contracts drawn up in Los Angeles and sent back to Chicago [Tr. p. 249]. Counsel for Gerry Horton Farms then drew up the agreements, note and chattel mortgage and same were executed, being signed on behalf of Kaufman-Brown Potato Company at Chicago and on behalf of Gerry Horton Farms in California [Tr. p. 278, 147]. The contract so executed was introduced in evidence as Respondents' Exhibit "E" and is set forth in the transcript of record pp. 175-181. As a

result of a further conversation between the parties [Tr. p. 148] a like deal was arranged for the financing of the growing of a potato crop on a lease held by Gerry Horton Farms at Arvin, California. The contract covering this deal was introduced in evidence as Respondents' Exhibit "D," and is set forth in the transcript of record pp. 169-175. The form of the two contracts are identical with the exception of the dates, description of the real properties, amounts to be advanced and percentage interests. Under the terms of the two contracts Kaufman-Brown Potato Company were required to advance to Gerry Horton Farms \$17,800.00 on the Shafter deal and \$19,250.00 on the Arvin deal, or a total of \$37,050.00. Kaufman-Brown Potato Company not only advanced such sum so required, but advanced additional amounts so that its total advancement in connection with said deals was \$42,694.82 [Tr. p. 156]. After harvesting and sale of crops \$20,000.00 was repaid [Tr. p. 163].

Pursuant to the contracts Gerry Horton Farms planted, raised and harvested the crops. At all times said partners Gerry Horton and J. D. Althouse retained full title to the leases and the equipment used in the growing operations [Tr. p. 270]. Kaufman-Brown Potato Company had no part or control in the management, planting or harvesting of the potato crops [Tr. pp. 271-272]. Moneys received by Gerry Horton Farms, first party to said agreements, and composed of Gerry Horton and J. D. Althouse, both as to advancements from Kaufman-Brown Potato Company and from the sale of crops, were deposited partly in the bank accounts of said Gerry Horton Farms and partly in the bank account of Gerry Horton Company. Kaufman-Brown Potato Company had no right to sign checks upon said accounts [Tr. p. 272] nor

did Kaufman-Brown Potato Company employ or discharge any employees engaged in said potato operations [Tr. p. 271]. After the potatoes were harvested, Gerry Horton Farms sold the same [Tr. p. 275]. A considerable portion was purchased by Kaufman-Brown Potato Company in accordance with the right given it to purchase under the contract [Tr. p. 162]. Kaufman-Brown Potato Company paid the money covering the purchase price to the said Gerry Horton Farms and same was deposited as aforesaid, partly in its account and partly in the account of Gerry Horton Company [Tr. pp. 273, 276]. The operations resulted in a loss of from \$20,000.00 to \$25,000.00 [Tr. p. 275].

On August 5, 1944, an involuntary petition of bankruptcy was filed against Gerry Horton and J. D. Althouse, doing business as Gerry Horton Company, a co-partnership, Gerry Horton and J. D. Althouse, doing business as Gerry Horton Farms, a co-partnership, Gerry Horton, an individual, and J. D. Althouse, an individual, by three creditors, one of which creditors was Kaufman-Brown Potato Company [Tr. p. 2]. Thereupon the proceeding was referred to Walter A. Berkman, a Referee in Bankruptcy of the Court [Tr. p. 10]. After proceedings were duly had each of said parties against whom said petition was filed was adjudicated a bankrupt on Order made and entered by said Referee on August 15, 1944 [Tr. p. 11]. Later, Waldo R. Bergman retired as Referee and was succeeded by William A. McGugin, the present Referee [Tr. p. 30]. Wayne Long was appointed and qualified as Trustee in Bankruptcy of the estates of the Bankrupts [Tr. p. 13]. In the course of the bankruptcy proceeding Kaufman-Brown Potato Company filed its proof

of claim against the bankrupts for \$23,479.79 [Tr. p. 81]. Said amount was made up of \$22,594.82 representing the balance unpaid on advancements, as hereinbefore set forth, and \$884.97 representing over-drafts drawn on the claimant by Gerry Horton Company [Tr. p. 82].

On October 24, 1946, Wayne Long, as Trustee of said Bankrupt Estates, filed objections to said claim on the ground that claimant was a joint adventurer or a partner with the bankrupts in a portion of the operations of the bankrupt, namely, the farming operations [Tr. p. 85]. On November 15, 1946 said Wayne Long, as Trustee, filed his "Petition for order Amending, Modifying and Changing Order of Adjudicating and Petition for Order to Show Cause directed against Partners" on essentially the same grounds urged in the objection to claim [Tr. p. 14]. Hearings were held resulting in the orders complained of in these appeals. From the foregoing, questions arose as follows:

Questions Involved and Presented.

- (1) Did the Proceedings in this bankruptcy case justify the Court in entering an order adjudicating Gerry Horton Farms, an alleged co-partnership engaged in the raising of potatoes, a bankrupt?
- (2) Was Kaufman-Brown Potato Company a co-partner with Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, in a co-partnership?
- (3) Was the order of the Court in respect to the proof of debt filed by Kaufman-Brown Potato Company erroneous?

Specifications of Error Relied Upon.

(a) Appellants contend that the judgment of the District Court and the findings of fact and conclusions of law upon which the same was based in respect to the judgment entered in Judgment Book 5, page 258, involving the matter of the Modification of Order of Adjudication, was erroneous in the following particulars:

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms, a partnership engaged in the raising of potatoes, though the evidence was insufficient to prove it was ever such a partner and, on the contrary, established that it was not a partner.

II.

The Order, Judgment and Decree of the Court in adjudicating Gerry Horton Farms, a partnership engaged in the raising of potatoes, composed of Kaufman-Brown Potato Company, a co-partnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, bankrupt, was erroneous in that said Kaufman-Brown Potato Company was not a co-partner and there was no such partnership, and also in that neither the proceedings had nor the evidence adduced permitted or justified such Order.

III.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company, and the co-partners composing it, namely,

Charles H. Kaufman and Albert H. Brown, are liable for the payment of the debts and obligations of Gerry Horton Farms, a co-partnership, and the costs and expenses in the bankruptcy proceedings, since it should have decreed that said Kaufman-Brown Potato Company and its co-partners were not liable for the debts and expenses involved in such bankruptcy proceedings.

IV.

The Order, Judgment and Decree of the Court was erroneous in that Kaufman-Brown Potato Company, and the said co-partners composing it, did not consent to the adjudication in bankruptcy in this proceeding of any parties except Gerry Horton and J. D. Althouse, doing business as Gerry Horton Company, a co-partnership; Gerry Horton and J. D. Althouse doing business as Gerry Horton Farms, a co-partnership; Gerry Horton, an individual, and J. D. Althouse, an individual, and did not consent or request that the court administer any estates or the property of any estates other than the estates and the property of the above-named parties.

V.

The findings of fact and conclusions of law upon which said Order, Judgment and Decree is based are not supported and not justified by the evidence in the case.

VI.

The Order, Judgment and Decree of the Court and the findings of fact and conclusions of law upon which said Order, Judgment and Decree is composed are erroneous, in that Kaufman-Brown Potato Company was not a co-partner with Gerry Horton Farms in any partnership;

in that no such co-partnership was ever intended to be formed, or was formed between Gerry Horton Farms and Kaufman-Brown Potato Company; in that Kaufman-Brown Potato Company did not have its California office at the office of Gerry Horton Farms; in that Kaufman-Brown Potato Company did not have the right to make contracts, incur liabilities, or manage or control the business of Gerry Horton Farms in connection with the growing of potatoes or at all, and did not make contracts, incur liabilities, manage or control such business; in that Kaufman-Brown Potato Company did not jointly with Gerry Horton Farms, or at all, participate in the management or control of the business of Gerry Horton Farms in connection with the growing of potatoes; in that neither Kaufman-Brown Potato Company nor Charles H. Kaufman nor Albert E. Brown, its co-partners, consented to an adjudication in bankruptcy of any parties other than those adjudicated bankrupt in the original order of adjudication, nor to an administration of the estates or property other than the estates and property of such parties; in that Kaufman-Brown Potato Company did no acts and participated in no acts set forth in said findings as done by Kaufman-Brown Potato Company in connection with Gerry Horton Farms, save and except things done by it pursuant to its agreement with Gerry Horton Farms, which things so done by it were not done as a partner of Gerry Horton Farms; in that no false representations were made to the Court respecting the status of Kaufman-Brown Potato Company, and in that Kaufman-Brown Potato Company was a creditor of Gerry Horton Farms, a partnership composed only of Gerry Horton and J. D. Althouse.

VII.

The Order, Judgment and Decree of the Court was erroneous in that it adopted the order of the Referee as amended, the findings of fact and conclusions of law of the Referee as amended, and approved and confirmed the same, though the errors herein complained of in respect to the order of the Judge of the District Court exist and apply with equal force to the said order, findings of fact and conclusions of law of the referee as amended by the Court.

(b) Appellants contend that the judgment of the District Court and the findings of fact and conclusions of law upon which same was based in respect to the judgment entered in Judgment Book 5, page 271, re Disallowance of Claim, was erroneous in the following particulars:

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms, a partnership engaged in the raising of potatoes, though the evidence was insufficient to prove it was ever such a partner, and, on the contrary, established that it was not a partner.

II.

The Order, Judgment and Decree of the Court was erroneous in disallowing the major portion of such claim against Gerry Horton Company, a co-partnership, and in disallowing the said claim against Gerry Horton Farms, a partnership composed of Gerry Horton and J. D. Alt-

house, and was erroneous in making any order respecting an allowance with respect to Gerry Horton Farms, a partnership decreed to be composed of Kaufman-Brown Potato Company and Gerry Horton Farms, since Kaufman-Brown Potato Company was not a partner with Gerry Horton Farms in any partnership and such non-existent partnership was improperly adjudged to be a bankrupt.

III.

The findings of fact and conclusions of law upon which said Order, Judgment and Decree was based are not supported by and not justified by the evidence.

IV.

The Order, Judgment and Decree of the Court was erroneous in that it adopted the order of the Referee as amended, the findings of fact and conclusions of law of the Referee as amended, and confirmed the same, though the errors herein complained of in respect to the order of the Judge of the District Court exist and apply with equal force to the said order, findings of fact and conclusions of law of the Referee as amended by the Court.

(c) Appellants contend that the Minute Order of the District Court, dated the 25th day of July, 1949, is erroneous for the same reasons that the two written orders, above-described, are erroneous, and here adopt without repeating the same the same specifications of errors as set forth in respect to said written orders.

ARGUMENT.

I.

Did the Proceedings in This Bankruptcy Case Justify the Court in Entering an Order Adjudicating Gerry Horton Farms, an Alleged Co-Partnership Engaged in the Raising of Potatoes, a Bankrupt.

We deny that any partnership existed wherein Kaufman-Brown Potato Company was a partner with Gerry Horton Farms and later in this brief will cover that point. For the purposes of this phase of the matter we shall direct our argument to the point that the order of the Court adjudicating Gerry Horton Farms, a partnership engaged in the raising of potatoes and composed of Gerry Horton Farms and Kaufman-Brown Potato Company, was improper even if there was such a partnership. It is to be noted that the modification of the original Order of Adjudication simply added a new partnership as one of the bankrupts, such partnership being one in which Gerry Horton Farms, an adjudicated partnership, was found to be a general partner with Kaufman-Brown Potato Company.

Courts of bankruptcy are courts of limited jurisdiction (*Taft v. Century*, C. C. A. 8 Cir., 141 Fed. 369) and its limitations are fixed by the Bankruptcy Act (*In re Patterson MacDonald*, W. D. Wash., 284 Fed. 281); *Wheeling v. Moss*, C. C. A. 4th Cir., 62 F. 2d 37; *Chicago v. Carter*, C. C. A., 8th Cir., 61 F. 2d 986; *In re Prima*, C. C. A. 7th Cir., 98 F. 2d 952). Consent cannot confer jurisdiction over subject matter where jurisdiction does

not exist. (See cases cited in C. J. S., Vol. 21, p. 127, sec. 85, Note 50.) An order of adjudication was entered in this proceeding of a kind not sanctioned by the Bankruptcy Act. Section 5 of the Bankruptcy Act is the section primarily devoted to the question of partnership bankruptcies. Nowhere in that section, or any place in the Act, is there found any right to adjudicate a partnership a bankrupt in a proceeding of the nature with which we are dealing. We conclude from the order of the Court and the findings of fact and conclusions of law that the Court acting upon the assumption that Kaufman-Brown Potato Company being one of the petitioners in the bankruptcy proceeding wherein Gerry Horton Farms, a co-partnership, was adjudicated a bankrupt and in such petition Kaufman-Brown Potato Company having alleged an indebtedness which the Court found was in reality the indebtedness of another co-partnership wherein it was a partner of Gerry Horton Farms, that by its act in so doing and by its further act in filing a claim against said Gerry Horton Farms so originally adjudicated, and by allegedly concealing its status as a partner with Gerry Horton Farms, consented to the adjudication in bankruptcy and is estopped from denying that it so consented. Nowhere in Section 5, or any part of the Bankruptcy Act, is provision made permitting an adjudication in bankruptcy on such grounds.

Predicated on those grounds, possibly the Court would have had power to have drawn in Kaufman-Brown Potato Company as a partner in the adjudicated partnership of Gerry Horton Farms. In its order and its findings the Court was particularly careful, however, not to decree or find that Kaufman-Brown Potato Company was a partner of Gerry Horton Farms, a co-partnership composed of

Gerry Horton and J. D. Althouse, the adjudicated partnership, but did decree and find that it was a partner with Gerry Horton Farms in a separate partnership known as Gerry Horton Farms engaged in the growing of potatoes, and adjudicated such partnership to be bankrupt as a distinct partnership, separate and apart from Gerry Horton Farms originally adjudicated a partnership.

It is provided under *sub-division (i) of Section 5 of the Bankruptcy Act* that where one of the general partners of a partnership is adjudged a bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the general partner or partners, not adjudged bankrupt. It may be that the acts of Kaufman-Brown Potato Company were such that its consent to an administration of the assets in the bankruptcy proceeding might be implied. A solvent partner standing by without protest to the administration of the firm assets in a bankruptcy proceeding of an insolvent partner may be deemed to have consented thereto. It is to be noted, however, that a solvent member's participation in the bankruptcy proceeding against his co-partner by the presentation by an alleged provable claim upon which an attempt to vote for a trustee, will not constitute a waiver.

Tate v. Brinser, D. C. Pa. 226, Fed. 878.

Here, however, the Court goes further than the Bankruptcy Act permits. Without an act of bankruptcy having been alleged and with one of the alleged partners solvent, having a net worth of \$100,000, the Court adjudicates that partnership to be a bankrupt.

Further, we contend that if it be deemed the Court had jurisdiction in the premises, nevertheless the premises

upon which the Court based its order of adjudication were not sound. There is nothing in the record upon which to predicate a consent on the part of the Kaufman-Brown Potato Company that the alleged co-partnership, of which it is alleged to be a member, might be adjudicated a bankrupt. Its position at all times was that Gerry Horton Farms, a partnership composed of Gerry Horton and J. D. Althouse, was indebted to it. Its petition in bankruptcy was aimed against that particular partnership. Its proof of debt was against that particular partnership. Its action in voting for a trustee was to vote for a trustee of that particular partnership. Whether its position was or was not correct that said particular partnership was indebted to it, there is nothing to show by the least implication that it was consenting that its indebtedness was against some other partnership or that it was doing any act at all with respect to some other partnership. We might point out further that even if its indebtedness was in reality an indebtedness against Gerry Horton Farms, a partnership composed of itself and Gerry Horton Farms, engaged in the growing of potatoes, that Gerry Horton Farms, the partnership composed of Gerry Horton and J. D. Althouse, was nevertheless indebted to it. Such partnership, if it existed, lost from \$20,000.00 to \$25,000.00. The loss was all borne by Kaufman-Brown Potato Company and under the agreements Gerry Horton Farms, the partnership composed of Gerry Horton and J. D. Althouse, was indebted to it at least by way of

contribution. Nor is there anything in the record upon which to predicate a finding that Kaufman-Brown Potato Company made fraudulent representations or concealments of its status. The entire course of conduct of Kaufman-Brown Potato Company, and which hereafter in this brief will be argued more extensively, shows that it did not deem itself to be a partner of Gerry Horton Farms. It will be for this Court to pass upon the question as to whether it was correct in its viewpoint. If, in fact, a partnership existed, nevertheless it is a far cry from acting under an incorrect belief and acting under fraudulent intention. To stigmatize a party as one guilty of fraud requires a degree of evidence totally lacking in this case. At most, the findings of the court could have been no more than that Kaufman-Brown Potato Company was acting under a misapprehension of its legal status. The Court goes on to find that by reason of its act and conduct, and in particular by surrendering the assets of Gerry Horton Farms, a co-partnership, to the Trustee for administration and the filing of a proof of debt against Gerry Horton Farms, Kaufman-Brown Potato Company is estopped from denying that it did not consent to the adjudication in bankruptcy. At most, the surrendering of assets would constitute a consent to the administration of such assets by a solvent person under Section 5 (i) of the Bankruptcy Act and could not be deemed to be a consent to the adjudication in bankruptcy. The filing of the proof of debt as set forth above cannot even be construed to be a consent to the administration in bank-

ruptcy of partnership assets on the part of a solvent partner.

Tate v. Brinser, 226 Fed. 878.

The petition in bankruptcy filed by Kaufman-Brown Potato Company and other creditors was against the partnership of Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, and not against any alleged partnership of which it is alleged to be a member. Consequently we do not see how the doctrine of estoppel can be invoked. Moreover the record is barren of any evidence that there was any holding out of this alleged partnership of Gerry Horton Farms and Kaufman-Brown Potato Company to any creditor. Likewise, estoppel arises only because of some act or omission of a party sought to be charged which, if disregarded, would cause injury to innocent third persons. No evidence to that effect appears in the record here. No one has been injured or will be injured if the Kaufman-Brown Potato Company, a partnership, is not adjudicated a bankrupt. It is personally solvent and creditors can pursue their legal remedies if any against it as if it never had anything to do with the above-entitled case either as petitioning creditor in the involuntary petition or otherwise.

II.

**Kaufman Brown Potato Company Was Not a
Partner of Gerry Horton Farms.**

- (a) ANY DEALING BETWEEN GERRY HORTON FARMS AND KAUFMAN-BROWN POTATO COMPANY WAS NOT AN ASSOCIATION FOR THE PURPOSE OF JOINTLY CARRYING ON A BUSINESS.

In Paragraphs 4 and 7 of each of the agreements between Gerry Horton Farms and Kaufman-Brown Potato Company [Tr. pp. 170-172, 176-178], provision is made for the sharing of profits obtained from the sale of the potato crops, and losses that may be sustained in the planting, raising and harvesting of said crops. We believe that the Court placed undue emphasis on these provisions, and failed to take proper cognizance of a more vital element in connection with what constitutes a partnership, viz., the necessity that there be a purpose of *jointly carrying on the business*.

In

Martin v. Sharp & Fellows Contracting Co., 34
Cal. App. 584, at page 588,

it is said:

“By section 2395 of the Civil Code, a partnership is defined to be ‘the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them.’ Under this definition, a mere participation in profit and loss does not necessarily constitute a partnership, for, as said in *Dwinel v. Stone*, 30 Me. 384, ‘there must be such a community of interest as empowers each party to make contracts, incur liabilities, man-

age the whole business, . . . a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased.' To like effect are *Coward v. Clanton*, 122 Cal. 451 (55 Pac. 147), *Vanderhurst v. De Witt*, 95 Cal. 57 (50 L. R. A. 595, 30 Pac. 94) and *Nofsinger v. Goldman*, 122 Cal. 609 (55 Pac. 425), in the former of which it is said that profit sharing is not the true test of partnership. The association must be for the purpose of *jointly carrying on the business*. Mulligan was not interested in the conduct of the business, except in so far as it affected the profits, one-half of which he was to receive for the use of the money, not advanced to the partnership but *loaned to Martin*."

To the same effect are:

Black v. Brundige, 125 Cal. App. 641 (p. 645);

Spier v. Lang, 4 Cal. 2d 711, at page 716,

and numerous cases cited in the foregoing cases.

It is true the Court in this case finds that Kaufman-Brown Potato Company had the right to make contracts and incur liability on behalf of said partnership, and manage and control the business and jointly carry on the business of said partnership, and that it so did. The evidence, however, is entirely contrary to such finding. The testimony of Gerry Horton [Tr. p. 272] was as follows:

"Q. (By Mr. Colby) You were the manager all the way through this deal, were you not? A. That is correct.

Q. Did they [referring to Kaufman and Brown] interfere in any way whatever in your management of the operations? A. No.

Q. Did they have any right to sign checks on the bank account of the operation on the potato deal?

A. No.”

The evidence further shows that Kaufman-Brown Potato Company did not have anything to do with the buying of supplies or materials or the hiring or firing of help [Tr. p. 271]. Moreover, the agreements between Gerry Horton Farms and Kaufman-Brown Potato Company provided that the first parties, to-wit, Gerry Horton and J. D. Althouse, co-partners, doing business under the firm name and style of Gerry Horton Farms should devote their best efforts toward planting, raising and harvesting the potato crops, and that they should furnish any and all equipment that may be required [Tr. pp. 173-179]. Moreover, it is provided in said agreements for either the purchase by Kaufman-Brown Potato Company, in which case, of course, marketing would be for their own account, or under certain conditions for the sale by second parties as *agents* for first parties, namely, Gerry Horton and J. D. Althouse, co-partners, doing business under the firm name and style of Gerry Horton Farms. The dealings between the parties therefore did not measure up to that association for the purpose of jointly carrying on business that is required before the association can be said to be a partnership.

(b) APPEARANCE OF WORD “PARTNER” IN AGREEMENT DOES NOT ESTABLISH THAT A PARTNERSHIP EXISTED.

In paragraphs 4 and 8 of each agreement between the Gerry Horton Farms and Kaufman-Brown Potato Company [Tr. p. 172-179] the word “partner” appears, though in all other parts of the agreement the word “parties” is

used. In that, one may well deduce from the testimony of both Mr. Kaufman and Mr. Horton that the word "partner" was never used in their conversations preceding the signing of the contracts; that its appearance in the agreements was through inadvertence is strengthened when we consider that throughout each agreement the word "parties" appears frequently, and no reason exists why the word "parties" was not used in the isolated instances when the word "parties" would have been more applicable. It is very seldom that the words "partner hereto" are used in agreements, the more usual term being "partners hereof" or "said partners," but the term "parties hereto" is more frequently and appropriately used. Is it too much to assume that a typographical mistake was made, and that the word "partners" could be read "parties" without doing violence to the general import of the contract? For if they were in fact not entering into a partnership relationship, and if the general tenor of their agreement was something else, one word alone would not constitute a partnership, any more than one swallow makes a summer.

Be that as it may, however, the true test of whether a partnership relation exists is whether that relationship measures up to the legal test of a partnership, and not whether the parties called it such. In the case of *Smith v. Grove*, 47 Cal. App. 2d 456, at page 461, it is said:

"The plaintiffs call to our attention the use of the word 'partnership' in the instrument written October 30, 1930, and to the same word used in the letter from which we have just quoted, and they argue earnestly that therefore the said instrument constituted a partnership agreement. We may not so hold. The trial court made a finding directly to the con-

trary. We are not at liberty to disturb that finding even though we disagreed with the trial court. (6 Cal. Jur. 329.) But we do not disagree with the trial court. The nature of the instrument is not to be determined by what the parties called it. (Kloke v. Pongratz, 38 Cal. App. (2d) 395, 402 (101 Pac. (2d) 522).) Its nature is to be determined by its legal effect. The legal effect of an instrument claimed to be a contract of partnership *must be measured by the rules of law applicable thereto.*"

(c) THE AGREEMENTS IN QUESTION NEGATIVE INTENT TO FORM A PARTNERSHIP, OR THAT A PARTNERSHIP EXISTED.

The following elements appear in each of the two agreements which negative the creation of a partnership.

(a) The repayment of the advancement of money made by Kaufman-Brown Potato Company to the bankrupts was secured by a crop mortgage in each instance.

(b) No provisions exist relating to a bank account, or who should draw upon it.

(c) The sale of the potato crop to Kaufman-Brown Potato Company at the prevailing prices, and at its option, was to be made to them as purchasers.

(d) No language appears to the effect that they are entering into a partnership, nor that there is any sale of a partnership interest.

(e) No account is taken therein of the amount of capital to be invested by Gerry Horton Farms, nor does it provide for the usual provision that upon liquidation the parties shall be repaid ratably their capital.

(f) Kaufman-Brown Potato Company was to receive back its loans and advancements from the proceeds of the sales of the potato crops before the Gerry Horton Farms could reimburse itself for the costs and expenditures undertaken to be paid by Gerry Horton Farms.

(g) In paragraph 8 of said agreements, it is provided that in the event there is no prevailing market price for said potatoes upon harvest, Second Parties agree to handle said potatoes as *agents* for First Parties through the Terminal Market at Chicago, Illinois, thus establishing an agency relationship between Kaufman-Brown Potato Company and the First Parties to the contract, viz., Gerry Horton Farms, consisting of Gerry Horton and J. D. Althouse.

(h) The contracts are between Gerry Horton and J. D. Althouse, co-partners doing business under the firm name and style of Gerry Horton Farms, and Charles H. Kaufman and Albert H. Brown, doing business under the firm name and style of Kaufman-Brown Potato Company, and signed the same way. No provision is contained for a common name as is usual in a partnership agreement. From the manner in which these agreements were signed, an intention to maintain a clear separation between the Gerry Horton Farms and the Kaufman-Brown Potato Company is evident, as well as an intention to regard Gerry Horton and J. D. Althouse as the sole co-partners of Gerry Horton Farms.

(i) The agreements provide that the First Parties, that is, Gerry Horton Farms, shall not be liable to Kaufman-Brown Potato Company, in connection with the potato transaction, for loss occasioned by inclement weather, acts of God, or losses resulting from acts of

war or causes which are beyond the control of the First Parties, Gerry Horton Farms. Such a clause in the agreements is distinctly out of place if a partnership existed, and it was the intention of the parties that such partnership should exist. If a partnership did exist between the parties, then any such loss should be borne by them equally.

(d) THE CONDUCT OF THE PARTIES UNDER THE AGREEMENTS NEGATIVE AN INTENT TO FORM A PARTNERSHIP, OR THAT A PARTNERSHIP EXISTED.

(a) The complete control, management and operation of the Gerry Horton Farms and of the potato crop were in the hands of and actually carried out by Gerry Horton and J. D. Althouse, its partners.

(b) Neither Kaufman nor Brown, nor their partnership, Kaufman-Brown Potato Company, had any part in the management of the business of Gerry Horton Farms or the planting, harvesting and sale of the potato crop [Tr. pp. 271-272].

(c) The leases of the land at Shafter and Arvin to Gerry Horton Farms, executed prior to the dates of the two agreements, and the equipment thereon were never assigned to the alleged partnership, nor did Kaufman-Brown Potato Company ever acquire any interest therein [Tr. pp. 269-270].

(d) Gerry Horton testified that he and J. D. Althouse were engaged in the buying and selling and speculating in

potatoes and produce in general as the Gerry Horton Farms and Gerry Horton Company, in both of which companies he and J. D. Althouse were partners [Tr. p. 254].

(e) The money received from Kaufman-Brown Potato Company for the shipments of potatoes to them was deposited by Gerry Horton, either in the bank account of Gerry Horton Farms, or Gerry Horton Company, and not to the credit of any partnership [Tr. p. 273].

(f) When the transactions involved in the agreements were concluded, Gerry Horton, on July 12, 1944, sent Kaufman-Brown Potato Company checks on which Gerry Horton had caused the words "On Loan" to be placed, which checks were subsequently dishonored and form the basis of the claim now under consideration of Kaufman-Brown Potato Company against the Gerry Horton Farms [Tr. p. 264].

(g) Kaufman-Brown Potato Company had to pay for the potatoes shipped to them by the bankrupts in order to commandeer their delivery [Tr. pp. 273, 260, 172].

(h) The Gerry Horton Farms and the Gerry Horton Company were more or less affiliated, and their operation mixed together [Tr. p. 245].

(i) The Gerry Horton Company made demands on Kaufman-Brown Potato Company for a sum of money which was paid by Kaufman-Brown Potato Company [Tr. p. 243].

(e) CONCLUSIONS FROM THE PROVISIONS OF THE AGREEMENTS AND THE CONDUCT OF THE PARTIES.

From the foregoing, it appears that Kaufman-Brown Potato Company dealt as separate and distinct parties with Gerry Horton Farms and Gerry Horton; no credits were allowed or given as would be usual between partners; the advancements made by Kaufman-Brown Potato Company under the two contracts were treated as loans, in fact, secured for repayment by crop mortgages given them by the bankrupts; when an attempt was made to repay by checks these loans or advancements, Gerry Horton so designated such repayments on such checks; Kaufman-Brown Potato Company and its partners were in Chicago and did not contemplate being on the ground to take part in the operations; the operations and the growing of said crop were all taking place in Kern County, California, under the complete supervision and control of Gerry Horton and J. D. Althouse, as partners of Gerry Horton Farms, and no control or supervision was ever exercised by Kaufman-Brown Potato Company over the growing of the crops or the moneys in the account of Gerry Horton Farms or Gerry Horton Company; and Gerry Horton and J. D. Althouse did as they pleased with the money received from the potato crop, intermingling the accounts of the Gerry Horton Farms and the Gerry Horton Company [Tr. p. 273]. The arrangement in fact was a financing arrangement, whereby the profit to be gained by Kaufman-Brown Potato Company for the advancement of funds was a right to purchase potatoes and to obtain a percentage of the expected profits.

III.

**The Order of the Court in Respect to the Allowance
of the Claim of Kaufman-Brown Potato Company
Was Erroneous.**

The findings of fact, conclusions of law and order of the Court in respect to the portion of the claim of Kaufman-Brown Potato Company in the amount of \$22,594.82 for money advanced to Gerry Horton Farms are predicated upon the fact of a partnership existing between Gerry Horton Farms and Kaufman-Brown Potato Company, and that the money was advanced to such partnership. The argument in this brief in respect to such alleged partnership as to the question of the propriety of the order of adjudication applies with equal force to the order in respect to the claim. We believe that no such partnership existed, and consequently the order of the Court based upon the premise that such partnership existed is erroneous. We might further add, however, that even though such partnership was properly found to exist, nevertheless Gerry Horton Farms, a co-partnership, composed of Gerry Horton and J. D. Althouse, and an adjudicated bankrupt herein, and its estate in bankruptcy would be liable to Kaufman-Brown Potato Company, the asserted partner of Gerry Horton Farms, engaged in the raising of potatoes for contributions arising out of the advancements made by Kaufman-Brown Potato Company. The total losses were between \$20,000.00 and \$25,000.00. It thus appears that substantially the total loss fell upon Kaufman-Brown Potato Company. Under the agreement, Gerry Horton Farms, composed of Gerry Horton and J. D. Althouse were obligated to stand certain prescribed percentages.

Under any circumstances, therefore, the order of the Court in respect to the claim filed by Kaufman-Brown Potato Company was erroneous.

Conclusion.

We submit, therefore, that from the facts and the law the three orders involved in this consolidated appeal and likewise the orders of the Referee as amended, adopted and confirmed by the Court are erroneous and should be reversed in that:

1. The proceedings had in this case did not permit or justify the Court in entering an order adjudicating Gerry Horton Farms, an alleged co-partnership, engaged in the raising of potatoes, a bankrupt.
2. There was no partnership composed of Gerry Horton Farms and Kaufman-Brown Potato Company.
3. The claim of Kaufman-Brown Potato Company against the bankrupts should have been allowed as a general unsecured claim.

Respectfully submitted,

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Attorneys for Appellants.

No. 12,390

IN THE

United States Court of Appeals
For the Ninth Circuit

KAUFMAN-BROWN POTATO COMPANY, a
Partnership composed of Charles H.
Kaufman and Albert H. Brown,
CHARLES H. KAUFMAN and ALBERT
H. BROWN,

Appellants,

vs.

WAYNE LONG, as Trustee in Bank-
ruptcy of the Estates of Gerry Hor-
ton and J. D. Althouse, doing busi-
ness as Gerry Horton Company, a
Co-Partnership; Gerry Horton and
J. D. Althouse, doing business as
Gerry Horton Farms, a Co-Partner-
ship; GERRY HORTON, an individual,
and J. D. ALTHOUSE, an individual,

Appellees.

BRIEF FOR APPELLEES.

FILED

FEB 21 1950

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J. D. Althouse, doing business as
Gerry Horton Farms, a Co-Partner-
ship; GERRY HORTON, an individual,
and J. D. ALTHOUSE, an individual,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT IN REFERENCE TO APPEALS.

We have not changed the heading even though it is incorrect. The appellees are not as listed in the heading above. Gerry Horton Company is not involved in the appeal in any manner. The judgment which was rendered by the Referee and affirmed by the District Judge found that Gerry Horton and J. D. Althouse, doing business as Gerry Horton Farms, and Charles H. Kaufman and Albert H. Brown, doing business as Kaufman-Brown Potato Company, were copartners doing business as Gerry Horton Farms, in the business of raising potatoes during the year 1944, and that the Gerry Horton Farms, the copartnership that was raising potatoes, was a debtor of Kaufman-Brown, and was the partnership known as Gerry Horton Farms, against whom Kaufman-Brown filed the involuntary bankruptcy petition with two other creditors. Tr. pp. 68-69. Therefore the only appellee is Wayne Long as trustee in bankruptcy of the estate of Gerry Horton Farms, a copartnership composed of Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed only of Gerry Horton and J. D. Althouse.

STATEMENT OF THE CASE.

There were three partnerships:

1. Gerry Horton Company, a copartnership composed of Gerry Horton and J. D. Althouse. This partnership was adjudicated a bankrupt. Tr. pp. 67-69.

2. Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse. This partnership was not adjudicated a bankrupt on the involuntary petition, but the partners consented to bankruptcy court administration by turning over the assets to said court. This partnership was not in the business of raising potatoes. Kaufman-Brown Potato Company was not a creditor of this partnership. Tr. pp. 67-69.

3. Gerry Horton Farms, a copartnership composed of Kaufman-Brown Potato Company, a copartnership, and Gerry Horton Farms, a copartnership. This partnership was adjudicated a bankrupt on petition of three creditors, one of which was Kaufman-Brown Potato Company, but the petition did not set forth that said Kaufman-Brown Potato Company was a partner. This partnership was in the business of raising potatoes, and Kaufman-Brown Potato Company was a creditor. Tr. p. 69.

In the fall of 1943, Gerry Horton, a partner of Gerry Horton Farms, composed of himself and J. D. Althouse, and a partner of Gerry Horton Company, composed of himself and J. D. Althouse, conferred with Charles H. Kaufman and Albert H. Brown, copartners of Kaufman-Brown Potato Company. Tr. pp. 145-247. Details of financing to grow and harvest potato crop to be grown on lease land was discussed. All that was discussed the parties do not recall, but Kaufman-Brown Potato Company was to advance \$100.00 per acre, Gerry Horton was to supply the farming equipment, the leases were to be thrown in

on the deal, and Kaufman-Brown Potato Company was to get a certain percentage. Tr. p. 255. Mr. Kaufman stated that whatever the conversation was, it terminated in the execution of the written contract. Tr. pp. 149-150. Exhibits D and E, Tr. pp. 169-181. Mr. Horton says he told the California attorney who prepared the contracts the conversation which he had in Chicago with Mr. Kaufman and Mr. Brown Tr. pp. 255, 256, 260, 277, 278.

The contracts, which are the same except Kaufman-Brown had 50% loss or profit on one and 40% loss or profit on the other, contain the following: Gerry Horton and J. D. Althouse referred to as first parties; Charles H. Kaufman and Albert H. Brown referred to as second parties. First parties had lease on 1921½ acres of land and second parties desirous of buying 50% interest in potato crop. Tr. p. 169. Agreed between parties (1) First parties conveyed to second parties undivided 50% interest in potato crop to be grown. (2) Second parties paid to first parties \$19,250.00 for said interest. (3) If cost of planting and raising exceed \$19,250.00 then to be paid by first parties. Each of parties to pay 50% of cost of harvesting. Tr. p. 170. (4) Profits are to be divided equally between *partners* after repayment of \$19,250.00 to first parties and after repayment of advances made by second parties. Tr. pp. 170-171. (5) First parties to keep full books of account and records of all receipts and disbursements in connection with said potato crop, to be at office in Sill Building and open to inspection of second parties. (6) First parties war-

rant potato crop free from liens. (7) Any loss to be assumed 50% by first parties and 50% by second parties. (8) Option given to second parties to purchase crop. If no prevailing price, second parties to sell crop through Terminal Market, charging 10¢ per sack for said service rendered to the *partners* hereto. Money to be sent to first parties for accounting and distribution as set forth in contract. Tr. p. 172. Any mark up by virtue of O.P.A. 50% to first parties and 50% to second parties. (9) First parties to raise crop and furnish equipment. (10) First parties to give second parties chattel mortgage covering their undivided interest as security for their faithful performance. (11) Copy of note given with chattel mortgage. (12) Chattel mortgages solely as security for the performance and conditions contained in agreement and no other purpose, and first parties not to be held liable for loss resulting from causes beyond control of first parties. Tr. p. 174.

Gerry Horton was to manage the operation of farming. Tr. p. 272. The contracts provided for same. Tr. pp. 169-181. Kaufman-Brown Potato Company had option to buy all potatoes and if not bought to manage the sale of same in Chicago. Tr. p. 259. Kaufman-Brown Potato Company owned one-half of potato crop. Tr. p. 189. Money sent by Kaufman-Brown Potato Company was deposited in account of Gerry Horton Farms and Gerry Horton Company. Kaufman-Brown Potato Company had no right to sign checks on the accounts. Tr. p. 272. Kaufman said Horton did not furnish bank statements as promised. Tr. p. 164.

Horton did not use any money sent by Kaufman-Brown Potato Company except in the potato venture. Tr. p. 276. Kaufman and Brown came out to survey the operations, its progress, and made recommendations as to when the potatoes were to be dug. They had men helping them around the warehouse. Tr. p. 271. Both Kaufman and Brown came out to Bakersfield, California, to see if deal was making profit. Tr. pp. 159-160. Kaufman and Brown used same office as Gerry Horton. Tr. pp. 242-243. Books were open to inspection by Kaufman-Brown Potato Company. Tr. p. 243.

QUESTIONS INVOLVED AND PRESENTED.

1. Was Kaufman-Brown Potato Company a general partner of Gerry Horton Farms in the raising of potatoes in Kern County during the period from November 16, 1943 to July 8, 1944?

2. Did Kaufman-Brown Potato Company (with two other persons) in filing an involuntary petition in bankruptcy against said Gerry Horton Farms, of which it was a partner, and of which it was a creditor, consent to the adjudication of said partnership of which it was a member?

3. Should Kaufman-Brown Potato Company (a partner) creditor's claim be allowed until after non-partner creditors' claims are paid in full?

ARGUMENT.

I.

KAUFMAN-BROWN POTATO COMPANY WAS A PARTNER OF GERRY HORTON FARMS, WHO WAS RAISING POTATOES IN 1944.

The two contracts, Exhibits D and E, Tr. pp. 169-181, are identical except as to amounts and except that on one contract Kaufman-Brown Potato Company was to receive 40% of the profits or pay 40% of the losses and on the other Kaufman-Brown Potato Company was to receive 50% of the profits or pay 40% of the losses. The contracts provide as follows:

“The undisputed facts are that Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, entered into two agreements with Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, relative to the raising of potatoes in Kern County, and that copies of the originals of said agreements are attached to trustee's petition which is attached to this certificate. The two contracts are identical except as to amounts and except that on one contract Kaufman-Brown was to receive 40% of the profits or losses and on the other contract Kaufman-Brown was to receive 50% of the profits or losses. The agreements provide as follows: Tr. pp. 169-181.

1. Kaufman-Brown Potato Company purchased a 50% interest in the potato crop to be planted, raised and harvested upon the property and Kaufman-Brown was to pay a consideration for the interest. Paragraphs 1 and 2, Tr. p. 170.

2. Kaufman-Brown was to pay 50% of the harvesting cost of the potatoes. Paragraph 3, Tr. p. 170.

3. The net proceeds or profits obtained from the sale of the potato crop were to be divided between the *partners* on a basis of 50% to each. The contracts here specifically mentioned the partners. In other places in the contract where it mentions Kaufman-Brown is to do something it refers to Kaufman-Brown as second parties, and where Althouse and Horton are to do certain things it refers to them as first parties. Paragraph 4, Tr. pp. 170-171. First party was to keep proper books of all expenditures and the books and accounts and all other records were to be open to inspection and access of the second parties. Paragraph 5, Tr. p. 171.

4. Kaufman-Brown was to pay one-half of the losses. Paragraph 7, Tr. p. 172.

5. Kaufman-Brown had facilities for disposing of potatoes in Chicago, and Kaufman-Brown had a right to purchase the potatoes and if there was no prevailing market for the sale of potatoes, then Kaufman-Brown was to handle the potatoes through the Terminal Market at Chicago as Agent and they were to be paid a charge of 10¢ per sack as commission for their services rendered to the Partners. Here again the contract refers to *partners* when dealing with all of the parties and the contract further provides for equal division on mark ups. Paragraph 8, Tr. pp. 172-173.

6. Gerry Horton and J. D. Althouse had equipment and land leased to raise potatoes and

Gerry Horton and J. D. Althouse were to devote their best efforts to the raising and harvesting of the potatoes and to furnish equipment. They were to manage the farm operation. Paragraph 9, Tr. p. 173.

7. Kaufman-Brown had Gerry Horton and J. D. Althouse execute a promissory note secured by chattel mortgage for advancement and the contract provides 'that said advancement is solely for the security of the performance and conditions herein contained and for no other purpose and Gerry Horton and J. D. Althouse are not to be held liable to Kaufman-Brown for losses occasioned by weather', etc. Paragraphs 11 and 12, Tr. pp. 173-174."

Testimony of Kaufman regarding contracts was:

"Referee. In any event, whatever your conversation was, it terminated in the execution of a written contract, which you have here?

Mr. Kaufman. That's right." Tr. pp. 149-150.

Gerry Horton, who was called as a witness by Kaufman-Brown, testified on cross-examination:

"Mr. Johnston. Mr. Horton, you don't remember all the conversation you had back in Chicago with Mr. Kaufman and Mr. Brown, do you?

Mr. Horton. No, only just what I referred to a little while ago.

Mr. Johnston. And you don't remember all the conversation you had over the telephone from Minneapolis, do you?

Mr. Horton. No, I don't believe I did.

Mr. Johnston. You don't remember all the conversation you had with your attorney, Mr.

Chain, when you came back and asked him to prepare this agreement that is introduced in evidence, Defendant's Exhibit 'E'?

Mr. Horton. No.

Mr. Johnston. But what you told Mr. Chain to put in the contract was based upon what your agreement was with Mr. Brown and Mr. Kaufman back in Chicago?

Mr. Colby. Just a moment. That is asking, introducing matter not in evidence; your Honor will hear the question as told the reporter.

Mr. Johnston. Read it.

(Question is read by reporter.)

Mr. Johnston. I will change it.

Mr. Johnston. What you told Mr. Chain was what your conversation was back in Chicago, was it?

Mr. Horton. Yes.

Mr. Johnston. With Mr. Kaufman and Mr. Brown?

Mr. Horton. Yes.

Mr. Johnston. Then Mr. Chain prepared this contract, and you sent it back to Mr. Brown and Mr. Kaufman after you had read it?

Mr. Horton. Yes.

Mr. Johnston. And then you and your partner signed it?

Mr. Horton. Yes.

Mr. Johnston. Now, then, after that contract was entered into, you went into this deal out at Arvin, didn't you?

Mr. Horton. Well, they were all decided on at the same time; but for some reason or other there is a difference in the date of our contracts.

Mr. Johnston. Well, one of them had to be corrected on account of the acreage; isn't that it?

Mr. Horton. That is right.

Mr. Johnston. And that was dated later?

Mr. Horton. That is right.

Mr. Johnston. And when you related your conversation to Mr. Brown—or to Mr. Chain, it dealt with the conversation that you had had with Mr. Kaufman and Mr. Brown as to both contracts, didn't it?

Mr. Horton. That is right." Tr. pp. 277-279.

On March 21, 1947, Attorney Kendall, representing Kaufman-Brown Potato Company, stated to the court that Kaufman-Brown Potato Company was a general partner in the raising of potatoes.

"Mr. Kendall. Your position is, Mr. Johnston, that they are partners only in so far as this crop deal is concerned.

Mr. Johnston. As far as these contracts, they were in partnership on that.

Mr. Kendall. On the general farming crop, no; they were general farming partners as far as potatoes were concerned; yes. I do not think they were liable for the planting of the tomatoes, or for any brokerage transactions that the other company had. * * *" Tr. p. 189.

Testimony of Mr. Kaufman shows partnership:

"He (Horton) never furnished us with the bank statements, although he had promised repeatedly to do it." Tr. p. 164.

"Mr. Kendall. Did you consult with Gerry Horton regarding the financial outcome of the Arvin contract?

Mr. Kaufman. I did.

Mr. Kendall. And what was the conversation?

Mr. Kaufman. At the time, Mr. Horton stated that the records were not complete, but he was of the opinion that the Arvin deal would show a small loss.

Mr. Kendall. Did he give you any figures at that time?

Mr. Kaufman. At that time he said it may run into two or three thousand dollars.

Mr. Kendall. Did you have any conversation with Mr. Horton regarding the outcome of the Shafter deal?

Mr. Kaufman. I did.

Mr. Kendall. And what was that conversation?

Mr. Kaufman. Mr. Horton stated that in his opinion the Shafter deal would show a profit sufficient to overcome the deficit at Arvin.

Mr. Kendall. Mr. Horton had all the facts and figures before him at his office when he made those representations?

Mr. Kaufman. That's right; he did." Tr. pp. 159-160.

Testimony of Mr. Horton shows partnership:

"Q. (By Mr. Colby). You stated that Mr. Brown and Mr. Kaufman came out to California. Will you tell us what they did in connection with your farming operations on the Shafter and Arvin properties?

A. (Gerry Horton). That is right. Yes, they came out to survey the operation, its progress, and they had certain recommendations to make as to when we would start digging the potatoes, because it was naturally of interest to them; and they had men helping them around the warehouse. * * *" Tr. p. 271.

The appellants, at page 25 of their brief, set forth certain alleged elements which are claimed to appear in the partnership agreements, which appellants claim show that the agreements did not create a partnership. We cannot agree with the conclusions reached by appellants. The alleged elements are taken up in the order of the letters given them by appellants:

(a) "The repayment of the advancement of money made by Kaufman-Brown Potato Company to the bankrupts was secured by a crop mortgage in each instance."

In (i) appellants set forth that the agreement provided that first parties, that is, Gerry Horton and J. D. Althouse, would not be liable to Kaufman-Brown Potato Company for losses for any causes which were beyond the control of Gerry Horton and J. D. Althouse. Kaufman-Brown purchased a half interest in the potatoes, which was the only valuable asset. The potatoes then became the property of the copartnership and Kaufman-Brown received a chattel mortgage upon the half interest of Gerry Horton and J. D. Althouse as a guarantee of the performance of the agreement and for no other purpose.

(b) "No provisions exist relating to a bank account, or who should draw upon it."

The partnership agreement provided that Gerry Horton and J. D. Althouse should keep books of account and records, and all money obtained, even if the potatoes were purchased by Kaufman-Brown, was to be paid to them and an accounting was to be made

and the profits were to be divided according to agreement. There was no necessity for providing for a bank account.

(c) "The sale of the potato crop to Kaufman-Brown Potato Company at the prevailing prices, and at its option, was to be made to them as purchasers."

Gerry Horton and J. D. Althouse could not sell the potatoes. Kaufman-Brown had a right to purchase the potatoes at the prevailing market price and if there was no prevailing market price, then the potatoes were to be sold at the Terminal Market in Chicago by Kaufman-Brown so that Kaufman-Brown jointly with Gerry Horton and J. D. Althouse controlled the sale of the potatoes.

(d) "No language appears to the effect that they are entering into a partnership, nor that there is any sale of a partnership interest."

The contracts provide that when certain things were to be done by the first parties and second parties jointly that they were referred to as partners; and the contracts provide that Kaufman-Brown had purchased a one-half interest in the potato crop.

(e) "No account is taken therein of the amount of capital to be invested by Gerry Horton Farms, nor does it provide for the usual provision that upon liquidation the parties shall be repaid ratably their capital."

Appellants are assuming that ordinary partnership contracts provide for pro rata upon dissolution. Such

is not the case. The matter is usually taken care of by law. The contracts or partnership agreements specifically provide that each of the persons were to receive the return of their advances and after the advances were paid the profits were to be divided, and if no profits, then the losses were to be divided.

(f) Kaufman-Brown was to receive back its advances before Gerry Horton and J. D. Althouse.

The amount of money mentioned in the chattel mortgage was not a loan, but was the amount paid by Kaufman-Brown for the one-half interest in the potato crop, and they were to receive the amount back out of the potato crop, and if there was a failure of the potato crop they were not to receive the return of their money. They were advancing \$100.00 an acre, which was the total amount necessary to plant and grow the potatoes.

(g) Kaufman-Brown had a right to sell the potatoes through Terminal Market at Chicago if no prevailing market.

This clearly shows that Kaufman-Brown jointly had a right to carry on part of the business as the potatoes could not be sold except through Kaufman-Brown, Kaufman-Brown having an option to first purchase the potatoes for itself, and if there was no prevailing market, then they would have the right to sell them upon the Chicago market.

(h) No name was mentioned in the agreements for the partnership.

After the agreements were signed Gerry Horton Company continued to operate, but Gerry Horton Farms, which was composed only of Gerry Horton and J. D. Althouse, was not in the business of raising potatoes at that time and was not in any business during the period of the contract or partnership agreement with Kaufman-Brown, and the copartnership between Gerry Horton and J. D. Althouse, as first parties, and Charles H. Kaufman and Albert H. Brown, as second parties, operated and farmed the potatoes under the name of Gerry Horton Farms. This was the copartnership against which Kaufman-Brown filed the bankruptcy petition and was the copartnership against which Kaufman-Brown had a claim and it was the copartnership which was raising potatoes. The other partnership of Gerry Horton Farms, which was composed only of Gerry Horton and J. D. Althouse, was not in business and was not raising potatoes at this time, and was not a debtor of Kaufman-Brown.

In appellants' brief, at page 27, it is stated:

“THE CONDUCT OF THE PARTIES UNDER THE AGREEMENTS NEGATIVE AN INTENT TO FORM A PARTNERSHIP, OR THAT A PARTNERSHIP EXISTED.”

There are then listed certain things which appellants believe prove that there was not a partnership. We cannot concur with appellants upon their belief and, further, some of the statements made are incorrect. We have set forth the appellants' statements

and after each one of the statements have set forth the evidence pertaining to the question, as well as an explanation as to the inaccuracy of appellants' beliefs.

(a) "The complete control, management and operation of the Gerry Horton Farms and of the potato crop were in the hands of and actually carried out by Gerry Horton and J. D. Althouse, its partners."

(b) "Neither Kaufman nor Brown, nor their partnership, Kaufman-Brown Potato Company, had any part in the management of the business of Gerry Horton Farms or the planting, harvesting and sale of the potato crop (Tr. pp. 271-272)."

Paragraph 9 of contract (Tr. p. 173) provides that first parties, Gerry Horton and J. D. Althouse, should raise, plant and harvest the potatoes. Paragraph 8 of contract (Tr. p. 172) provides for second parties, Charles H. Kaufman and Albert H. Brown, handling potatoes through markets in Chicago.

Kaufman and Brown came to California and made survey of the operations and made recommendations as to when potatoes should be dug. They had men helping them around the warehouse. Tr. p. 271. Both Kaufman and Brown came to Bakersfield, California, to see if deal was making a profit. Tr. pp. 159-160. They used same office as Gerry Horton. Tr. pp. 242-243.

If the arrangement was not a partnership, then Kaufman-Brown would have done like all other potato buyers do—make a straight loan, with option to

buy potatoes, without any share in profit or loss, and grower would not have been released on note if loss of crop for any cause, as in case before court.

(c) "The leases of the land at Shafter and Arvin to Gerry Horton Farms, executed prior to the dates of the two agreements, and the equipment thereon were never assigned to the alleged partnership, nor did Kaufman-Brown Potato Company ever acquire any interest therein (Tr. pp. 269-270)."

Contract, paragraph 9, Tr. p. 173, provides Gerry Horton and J. D. Althouse were to furnish equipment. Leases had no value, but one-half of the potato crop (the basis of the partnership) was conveyed to Kaufman-Brown Potato Company (paragraph 1, Tr. p. 170). The potato crop was what the parties expected would have the value, and was the property owned by the partnership, the Gerry Horton Farms that was raising potatoes, and of which Kaufman-Brown was a partner. The old Gerry Horton Farms was not raising potatoes. Tr. p. 69.

(d) "Gerry Horton testified that he and J. D. Althouse were engaged in the buying and selling and speculating in potatoes and produce in general as the Gerry Horton Farms and Gerry Horton Company, in both of which companies he and J. D. Althouse were partners (Tr. p. 254)."

No testimony was given that either of the Gerry Horton Farms was buying and speculating in potatoes. It was only Gerry Horton Company, of which Kaufman-Brown was not a partner, which was not in

the business of raising potatoes. At Tr. p. 254 Gerry Horton testified:

“A. Yes, I was engaged in the buying and selling and speculating in potatoes and produce in general.

Mr. Colby. Q. I see. Of which the Kaufman-Brown Potato Company did not share?

A. They had no share in the outside operations.”

At Tr. p. 274:

“Mr. Colby. Q. * * * Did the Horton Company buy potatoes from other farms and shippers and ship them under that deal? (Farm deal.)

Gerry Horton. A. Not under that deal. No. It is the practice of Gerry Horton Company to buy, ship and sell potatoes, both from other growers,——

Mr. Colby. Q. Did they do so during the operations of the Shafter-Arvin deal to the Kaufman-Brown Potato Company?

Gerry Horton. A. I can't testify correctly as to that, because it is quite possible we did on their request. We acted as their agents in a good many cases when they were unable to buy from other growers. We many times bought them under the name of Gerry Horton Company and shipped them to them. And that might have happened during this period of time. I can't testify for sure.”
Tr. pp. 274-275.

Cross-examination:

“Mr. Johnston. Q. Now, Mr. Colby asked you if you were in any other kind of business, and you

said you were buying and selling. Now, the buying and selling was handled by the Company and not by the farm?

Gerry Horton. A. "That is correct." Tr. p. 279.

(e) "The money received from Kaufman-Brown Potato Company for the shipments of potatoes to them was deposited by Gerry Horton, either in the bank account of Gerry Horton Farms, or Gerry Horton Company, and not to the credit of any partnership (Tr. p. 273)."

The money was deposited to either the account of the Farms or the Company. Tr. p. 273. Horton did not use any money sent by Kaufman-Brown Potato Company except in the potato venture. Tr. p. 276. Para. (5) Tr. p. 171 provides that first parties were to keep books of account. The money was credited to the partnership that was raising potatoes.

(f) "When the transactions involved in the agreements were concluded, Gerry Horton, on July 12, 1944, sent Kaufman-Brown Potato Company checks on which Gerry Horton had caused the words "On Loan" to be placed, which checks were subsequently dishonored and from the basis of the claim now under consideration of Kaufman-Brown Potato Company against the Gerry Horton Farms (Tr. p. 264)."

Check was written by bookkeeper. "On Loan" was on check. Loans had been made by Kaufman-Brown Potato Company to harvest potatoes, so why should not the words "On Loan" be written on check. It does not prove anything in the dispute.

(g) “Kaufman-Brown Potato Company had to pay for the potatoes shipped to them by the bankrupts in order to commandeer their delivery (Tr. pp. 273, 260, 172).”

The contracts provided that Kaufman-Brown had option to buy the potatoes at prevailing market price, and payment was to be made subject to accounting and distribution, as provided in contract. Par. 8, Tr. p. 172.

(h) “The Gerry Horton Farms and the Gerry Horton Company were more or less affiliated, and their operation mixed together (Tr. p. 245).”

This is prior to contracts with Kaufman-Brown which are dated January 22, 1944, and November 16, 1944. Tr. p. 169 and p. 175.

At Tr. p. 245 Gerry Horton testified:

“Mr. Colby. Q. At that time, November 16, 1943, what was your business or occupation?

Mr. Horton. A. Distributing and growing of potatoes.

Q. Under what name did you operate?

A. Gerry Horton Company, and Gerry Horton Farms.

Q. And who else was interested with you in that business?

A. J. D. Althouse.

Q. And was that a copartnership between you and Mr. Althouse?

A. Yes.

Q. And did you keep separate operations, the Farms and the Company?

A. We had separate sets of books, I believe. As we progressed in our operations, the activities

of one was more or less affiliated with the other. In fact, we were sometimes mixed up together.”

The cases cited by appellants in their brief on the question of partnership are where the facts are different than in the case before the court. Those cases cited are where there was no joint carrying on of the business or the agreement did not provide for one of the persons to manage and operate the business, while the case before the court provided that Mr. Horton and Mr. Althouse should manage the farming operations (Tr. par. 9, p. 173) and they were to keep the books and records (Tr. par. 5, p. 171), and Mr. Kaufman and Mr. Brown were to sell the potatoes in Chicago (Tr. par. 8, p. 172).

The courts have held that the delegation of the management and operation of a business to one of the parties does not prevent a partnership.

“A partnership is an association of two or more persons to carry on as co-owners a business for profit.” Section 15006(1) *Corporations Code* (formerly Sec. 2400(1) Civil Code.)

In the case of *Kersch v. Taber*, 67 Cal. App. (2d) at page 504, the Court, in determining what is a partnership states:

“The question of the existence of a partnership between the parties thereto should be determined primarily by ascertaining the intention of the parties in that regard. Where the respective parties have entered into a written agreement, the intention of the parties should be determined chiefly from the terms of the writing.”

True, the rule stated in the case is a rule given in determining a partnership between the parties involved and it would certainly apply where creditors were involved. Section 15007 (4) *Corporations Code* (formerly Section 2401 Civil Code, subdivision (4)) provides:

“The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. * * *”

In the case of *Lusher v. Silver*, 70 Cal. App. (2d) at page 588, the court states that one important test to determine a partnership is found in the above code section, and while the plaintiff received no part of the profits he testified that it was agreed that he should, and the court found in plaintiff's favor; and the court says:

“For the purposes of this appeal we must deem plaintiff's testimony in this respect, * * * sufficient to support the finding of the trial court that there was a partnership.”

In the case in question there is no dispute as to whether or not Kaufman-Brown would receive profits as the contracts specifically provide that they would receive profits. Section 15015 of the *Corporations Code* provides that all partners are liable for all debts and obligations of the partnership.

The case of *Associated Piping and Engineering Co., Ltd. v. Jones*, 17 Cal. App. (2d) 107, involves an agreement very similar to the one in the present case except that agreement did not mention the people as

partners, while in the agreement before the court when all of the parties to the contract were referred to the word "partners" was used. The Appellate Court in its decision, at pages 110-111, states:

"We may concede that a relationship of debtor and creditor is shown, and also that the contract expressly declares that appellant 'agrees to loan' various sums of money to the other parties. However, this does not establish the fact that the parties did not intend to create a partnership between themselves or as to a third person. The parties did intend to create exactly the relationship as shown by the contract, but did not intend that relationship to be called that of partnership. However, their intention in this respect is immaterial (*San Joaquin L. & P. Corp. v. Costaloupes*, 96 Cal. App. 322, 332 [274 Pac. 84]); and if the contract by its terms establishes a partnership between the parties, even the expressed intent that it should not be so classed would be of no avail. It is the intent to do the things which constitute a partnership that usually determines whether or not that relation exists between the parties. (*Chapman v. Hughes*, 104 Cal. 302 [37 Pac. 1048, 38 Pac. 109].) The provision in the contract that Mott and Jones 'shall retain full control of the management and operation of said business, subject, however, to the rights of the party of the first part,' (appellant herein) does not prevent a partnership, because the fact that by agreement between the parties one or more of them is given the management of the partnership enterprise does not prevent a partnership from arising. (*Westcott v. Gilman*, 170 Cal. 562, 567 [150 Pac. 777, Ann. Cas. 1916E, 437].) A partnership, especially

where, as here, the rights of third persons are involved is to be determined by the contract, taken with the conduct and dealings with the world of those who are parties to it. If that contract, and if those dealings, so far as the world is concerned, measure up to the partnership relation, with the joint duties and liabilities attaching thereto, then, so far as third parties are concerned who have had dealings with them, they are partners. (*Westcott v. Gilman*, supra, p. 568.)”

Lyon v. MacQuarrie, 46 Cal. App. (2d) 119, at 124:

“That there was no complete control of every part of the venture vested in each partner does not negative the existence of a partnership, for, by agreement, one partner may be given the duty of management of the partnership enterprise or any part of it. (*Thompson v. O. W. Childs Estate Co.*, 90 Cal. App. 552 [266 Pac. 293]; *Associated Piping & Engineering Co., Ltd. v. Jones*, 17 Cal. App. (2d) 107 [61 Pac. (2d) 536].)”

Thompson v. O. W. Childs Estate Co., 90 Cal. App. 552:

“The fact that by agreement between the parties one of them is given the management of the partnership enterprise does not prevent a partnership from arising, under section 2395 of the Civil Code” (now Section 15001 Corporations Code).

In Section 7, 20 *Cal. Jur.*, page 686, is the following:

“The existence of a partnership may be established, although the parties may not have used the

words 'partner' or 'partnership;' but the presence or absence of such words may be significant where the circumstances of the case leave the judicial conscience in doubt. Nor is it essential that the parties should have known that their contract in law created a partnership."

A partnership may be formed for a single venture. See *Stenian v. Tashjian*, 178 Cal. 623; *Gray v. The Janss Invest. Co.*, 186 Cal. 634.

The existence of a partnership must be determined by the law of the state which applies. *Ulter v. Irwin*, 132 Fed. (2d) 415 (C.C.A. Tex.).

Other California cases where the facts are similar to the present case are:

Streeter & Riddell, Inc. v. William S. Bacon,
49 Cal. App. 327:

"A written agreement to engage in the business of threshing beans for hire which provided that certain equipment belonging to one of the parties and that to be purchased by another should be their respective contributions to the business, and another should receive wages only and after reimbursements for advances to pay operating expenses the profits should be equally divided between the contributing owners, constituted a partnership, notwithstanding an express declaration in the agreement that it was not the intention to form a partnership and that neither of the parties should be liable for the acts and obligations of the other."

Clark v. Gridley, 49 Cal. 105, 106:

“When two parties, residing in different places, agree, the one to buy and ship wool, and to pay for the same to draw on the other, and the other to pay the drafts, and sell the wool in a home or foreign market, charging interest for his advances, the two to share equally the losses, or to divide equally the net profits; the parties are partners in the venture.”

Calkins v. Calkins, 63 Cal. App. 292 at 298:

“* * * However, they both declared in effect that they executed a written agreement to engage in the newspaper business and to share equally the profits and losses. Neither could say what became of said instrument but their oral testimony as to its substance and effect must be held to constitute sufficient support for the finding of the court. * * *” that it was a partnership.

Donleavey v. Johnston, 24 Cal. App. 319, at 325:

“ ‘While, of course, the question whether or not a partnership exists is to be determined from the nature of the relation agreed upon, rather than the name which the parties have given to it, some weight must be allowed to the language of the parties themselves.’ (*Title Ins. & Trust Co. v. Grider*, 152 Cal. 746, 752 [94 Pac. 601].)”

Fisher v. Sweet, 67 Cal. 228:

“The plaintiff and defendant purchased certain lands jointly for the purpose of farming and eventually selling the same. Some time after such purchase the parties entered into an agreement by which the plaintiff was to conduct the farming

operations, and the defendant to attend to shipping and selling the produce, the parties to share expenses equally, and after paying a reasonable compensation to the plaintiff for his services and the use of his teams and tools, to divide the net proceeds equally between them. *Held*, that these facts constituted a partnership between the parties with respect to the lands and the farming of the same."

Lanpher v. Warshauer, 28 Cal. App. 457:

"An agreement upon the subject of engaging in a certain building venture, wherein the skill and labor of one of the parties was to be combined with the capital of the other, and that the profits and losses of the business were to be equally shared, satisfies the code definition of a partnership, and must be held to constitute the parties co-partners in the absence at least of an agreement, express or implied, that the partnership relation was not to be created thereby."

Westcott v. Gilman, 170 Cal. 562 at 563:

"The contention that under this contract the non-existence of a partnership is shown because there was no community of interest in procuring the fruit (which can only mean that because one party was to devote his services to the procuring of fruit, precisely as the other was to devote its services to the handling and sale of it, each without charge), is untenable."

"While the element of profit sharing does not alone and of itself establish a partnership, it is an essential element of every partnership. A partnership, especially where the rights of third

parties are involved, is to be determined by the contract, taken with the conduct and the dealing with the world of those who are the parties to it. If that contract and if those dealings, so far as the world is concerned, measure up to the partnership relation, with the joint duties and liabilities attaching thereto, then so far as third persons are concerned, who have had dealings with them, the defendants are partners."

San Joaquin L. & P. Corp. v. Costaloupes, 96 Cal. App. 322 at 323:

"Where a partnership engaged in the cheese manufacturing business enters into an agreement with one of its creditors whereby said creditor is to advance to the partnership up to a specified amount of money, and the cheese manufacturing business is to be continued, and the manufactured product is to be turned over to said creditor for marketing, and the net proceeds from the business after the deduction of certain specified salaries is to be divided equally between said creditor and the copartnership, and interest on the indebtedness of the partnership to said creditor is waived, the relationship between said creditor and said partnership is that of copartners."

II.

WHEN KAUFMAN-BROWN WITH TWO OTHER PERSONS FILED AN INVOLUNTARY PETITION IN BANKRUPTCY AGAINST GERRY HORTON FARMS OF WHICH IT WAS A PARTNER AND OF WHICH IT WAS A CREDITOR, IT CONSENTED TO THE ADJUDICATION OF SAID PARTNERSHIP OF WHICH IT WAS A MEMBER.

Kaufman-Brown Potato Company, composed of Charles H. Kaufman and Albert H. Brown, a copartnership, was a creditor of Gerry Horton Farms, a copartnership which was raising potatoes in the year 1944. Kaufman-Brown Potato Company was a copartner of this Gerry Horton Farms, and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, was also a partner of the Gerry Horton Farms that was raising potatoes. The Gerry Horton Farms that was composed only of Gerry Horton and J. D. Althouse was not in the business of raising potatoes and was not a debtor of Kaufman-Brown Potato Company. Hence, when Kaufman-Brown Potato Company joined in filing an involuntary petition in bankruptcy against Gerry Horton Farms of which it was a creditor, it could only be against the partnership of which it was a partner and which partnership was raising potatoes. The Referee found and the District Judge confirmed the above facts:

“3. That at the time the involuntary petition in bankruptcy was signed by Kaufman-Brown Potato Company the said Kaufman-Brown Potato Company, and each of its partners, composed of said persons heretofore mentioned, knew that said

Kaufman-Brown Potato Company was a partner with Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, in the raising of potatoes, under the name of Gerry Horton Farms, a partnership, and knew that there was also a partnership composed of Gerry Horton and J. D. Althouse doing business under the name of Gerry Horton Farms not engaged in the raising of potatoes and not operating during the time potatoes were raised and in which said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown were not interested, and knew that said Kaufman-Brown Potato Company was a creditor of said partnership in the sum of \$22,594.82 and was not a creditor against the Gerry Horton Farms, a partnership composed of only Gerry Horton and J. D. Althouse; and the said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown each falsely represented, knowing same was false, to the court and creditors by the filing of said bankruptcy petition that Gerry Horton and J. D. Althouse were the only partners in the partnership of raising potatoes, and that the party raising potatoes under the name of Gerry Horton Farms was the partnership composed of only Gerry Horton and J. D. Althouse; and the said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown requested and consented that the court adjudicate Gerry Horton Farms, the party who was raising potatoes and who was indebted to Kaufman-Brown Potato Company, a bankrupt." Tr. pp. 68-69.

"4. That the attorney for said petitioning creditors was Donald Kendall and that at a meeting

of creditors held on the 16th day of September, 1944, the said Donald Kendall, representing said Kaufman-Brown Potato Company and other creditors, secured the election and/or appointment of Wayne Long as trustee, and thereafter said Donald Kendall and Dominic Bianco, at the request of said trustee, were appointed as attorneys for said trustee and acted as attorneys for said trustee until they resigned on or about the first part of December 1945; and during said period of time said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown never advised the court that there were two separate partnerships and that Kaufman-Brown Potato Company was a partner of Gerry Horton Farms, the partnership which was raising potatoes, and said Kaufman-Brown Potato Company consented and requested the court to administer the estate of Gerry Horton Farms, a copartnership, who was raising potatoes and who was indebted to Kaufman-Brown Potato Company." Tr. p. 70.

Appellants in their brief, at page 16, state:

"Predicated on those grounds, possibly the Court would have had power to have drawn in Kaufman-Brown Potato Company as a partner in the adjudicated partnership of Gerry Horton Farms. In its order and its findings the Court was particularly careful, however, not to decree or find that Kaufman-Brown Potato Company was a partner of Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, the adjudicated partnership, but did decree and find that it was a partner with Gerry Horton

Farms in a separate partnership known as Gerry Horton Farms engaged in the growing of potatoes, and adjudicated such partnership to be bankrupt as a distinct partnership, separate and apart from Gerry Horton Farms originally adjudicated a partnership.”

The last sentence of the above statement is in error as the Referee made no such finding. The Referee found that the partnership of Gerry Horton Farms that was originally adjudicated a bankrupt consisted of two partners: Kaufman-Brown Potato Company, composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms (the one that was not raising potatoes), composed only of Gerry Horton and J. D. Althouse. The Referee in the certificate to the Judge (at Tr. p. 60) stated:

“That I did not also adjudicate the partnership of Gerry Horton Farms, of which Kaufman-Brown Potato Company was a partner, a bankrupt as recited in said petition for review as said partnership was already adjudicated a bankrupt at the request of Kaufman-Brown, but said order modified and corrected said adjudication to include Kaufman-Brown Potato Company as one of the partners.”

The Referee in his memorandum of opinion at page 34 says:

“The petitioners consented to the adjudication when they filed the involuntary petition against the partnership. Since Kaufman-Brown Potato Co. filed the involuntary petition against the part-

nership of which it was a partner it thereby waived any right to object to adjudication.

The Court in the matter of *In re Filmar*, 177 Fed. 170, held that the joining by the non-bankrupt partner with a firm creditor in a petition asking that the former firm assets be applied first on firm debts was consent to adjudication of the partnership.

See the cases of *Sturn v. Ulrich*, 10 Fed. (2d) 9; and *The Matter of Shields and Mattison*, 14 Fed. (2d) 641."

The Referee's findings on the claim of Kaufman-Brown Potato Company were as follows:

"That Kaufman-Brown Potato Company, a co-partnership, advanced the sum of \$22,594.82 to Gerry Horton Farms, the partnership composed of Gerry Horton Farms, a copartnership, and Kaufman-Brown Potato Company, a copartnership, and the said sum has not been paid and said sum is still due and owing by said partnership to said Kaufman-Brown Potato Company; and that said sum of money was used by said partnership in the raising of potatoes by said partnership and that said sum was not advanced or loaned to Gerry Horton Farms, the copartnership composed only of J. D. Althouse and Gerry Horton." Tr. p. 106.

The appellants in their brief at page 17 state:

"It may be that the acts of Kaufman-Brown Potato Company were such that its consent to an administration of the assets in the bankruptcy proceeding might be implied. A solvent partner

standing by without protest to the administration of the firm assets in a bankruptcy proceeding of an insolvent partner may be deemed to have consented thereto."

We believe that the above statement is correct. The appellant Kaufman-Brown Potato Company, a co-partnership, not only falsely represented, knowing the same was false, to the court and the creditors that Gerry Horton and J. D. Althouse were the only partners of Gerry Horton Farms, the partnership that was raising potatoes, and against whom Kaufman-Brown Potato Company had a claim, but it kept the matter a secret and from the date of filing the bankruptcy petition, which was September 16, 1944, to December 1, 1945, did not advise the court that there were two partnerships operating under the name of Gerry Horton Farms, and it secured, with others, the election of a trustee. Now Kaufman-Brown Potato Company claims that its filing of the involuntary petition in bankruptcy requesting that the partnership of which it was a member and of which it was a creditor, and which partnership was raising potatoes, was not a consent to the bankruptcy court to administer the affairs of said partnership. There is no dispute as to the law that a partnership cannot be adjudicated a bankrupt if one partner is solvent and does not consent.

However, in the present case Kaufman-Brown, one of the petitioning creditors, consented to the adjudication of the partnership against whom it had a claim.

It did not have a claim against Gerry Horton Farms of which it was not a member. Can Kaufman-Brown at this late date claim that it did not consent to the adjudication of Gerry Horton Farms, after it helped surrender the small amount of assets of Gerry Horton Farms of which it was a partner to the Bankruptcy Court, secure the election of a trustee, have its attorney act as attorney for the trustee, fail to advise the Referee and the court that it had knowingly and falsely represented, knowing it was false, that J. D. Althouse and Gerry Horton were the only two partners?

Section 5-I of the Bankruptcy Act, commencing with the second sentence, provides:

“In the event of one or more but not all of the general partners of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the general partner or partners not adjudged bankrupt;”

If the solvent partner stands by without protest and allows the firm assets to be taken into the custody and control of the Bankruptcy Court, he may be deemed to have consented thereto. *In re Harris, D.C. Ohio*, 108 Fed. 517.

Kaufman-Brown, even though a partner of Gerry Horton Farms, the copartnership which was raising potatoes, could join as a creditor in an involuntary petition in bankruptcy against the partnership of

which it was a partner. See *Meek v. Centre County Bkg. Co.*, 268 U. S. 426, 69 L. Ed. 1028; *Hunter v. Hunter & Drew*, 8 Fed. Supp. 84 (D.C. La.).

“It is not a case of voluntary bankruptcy where one is forced into it against his will by his partner, it is compulsory and involuntary, if he refuses to join in such case.” *Metsher v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 654.

The Referee in his memorandum of opinion has cited the case of *In re Filmar*, 177 Fed. 170, which held that the joining by a non-bankrupt partner with a firm creditor in a petition asking that the former firm assets be applied first on firm debts was a consent to adjudication in bankruptcy. The court on page 175 quoted Section 5-h of the Bankruptcy Act, which is now Section 5-I, and stated that Swigart by the filing of his petition had appeared and the Bankruptcy Court had before it all parties in interest and his petition was a consent that the partnership property be administered by the court in accordance with the equitable principles approved by Congress.

It is to be remembered that in the present case the court amended and modified the original adjudication to include Kaufman-Brown as a partner. It is not a new petition. In the case of *In re Fuller*, 9 Fed. (2d) 553, 2nd Circuit, in an opinion written by Judge Hand, the court states that dormant partners in bankruptcy partnerships could be joined *nunc pro tunc* as alleged bankrupts notwithstanding expiration of four

months limitation of the Bankruptcy Act where failure to join him before expiration was due to excusable neglect caused by concealment of his membership in the firm.

III.

FINDINGS OF FACTS BY SPECIAL MASTER WHEN BASED ON SUBSTANTIAL EVIDENCE WILL NOT BE DISTURBED BY APPELLATE COURT.

“Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous.” General Order 47, Bankruptcy—U.S.C.A. Title 11, p. 115.

In re Henry Duffy Players, 50 F. (2d) 737 at 738 (C.C.A. 9th):

“The foregoing findings of fact by the special master and by the court below are based on substantial evidence and are not to be disturbed by this tribunal.”

Weisstein Bros. & Survol v. Laugharn, 84 F. (2d) 419 at 420 (C.C.A. 9th):

“* * * where facts are litigated before the referee, and where the witnesses appeared before him, and a decision upon the controverted facts had been made by him, the court will not ordinarily be justified in reversing the finding of the referee as to the controverted facts. *In re Gordon & Gelberg* (C.C.A.) 69 F. (2d) 81, 83; *Rasmussen v.*

Gresly (C.C.A.) 77 F. (2d) 252; Remington on Bankruptcy (4th Ed.) vol. 8, 3669, p. 41; Ingram v. Lehr (C.C.A.) 41 F. (2d) 169, 170."

Diamond Laundry Corporation v. California Employment Stabilization Commission, 162 F. (2d) 398 at 401 (C.C.A. 9th):

"These findings were approved by the District Judge, are supported by substantial evidence, are not clearly erroneous and should not be set aside."

The above case cites Rule 52, and that portion of Rule 52 which is applicable is:

Rule 52, U.S.C.A. Title 28, page 677:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

Universal Sales Corp. v. Cal. Press Mfg. Co., 20 Cal. (2d) 751 at 772:

"In summation of this branch of the case, it need only be said that the construction given the contract in suit by the trial court appears to be consistent with the true intent of the parties and where that is so, the appellate court will not substitute another interpretation though it seem equally tenable. (*Adams v. Petroleum Midway Co., Ltd.*, 205 Cal. 221, 224 (270 Pac. 668); *Kautz v. Zurich Gen. A. & L. Ins. Co., Ltd.*, 212 Cal. 576, 582 (300 Pac. 34); *McNeny v. Touchstone*, 7 Cal. (2d) 429, 435 (60 P. (2d) 986); *Slama*

Tire Protector Co. v. Ritchie, 31 Cal. App. 555, 562 (161 Pac. 25).)"

IV.

THE CREDITOR'S CLAIM OF KAUFMAN-BROWN POTATO COMPANY (ONE OF THE PARTNERS) SHOULD NOT BE ALLOWED UNTIL AFTER NON-PARTNER CREDITORS' CLAIMS ARE PAID IN FULL.

Since Kaufman-Brown Potato Company is a partner of Gerry Horton Farms, the bankrupt, its claim should not be allowed until all non-partner creditors' claims have been paid in full, as all general partners are liable to creditors and it does not seem possible that a general partner's claim should be allowed against the partnership until all other creditors who are not general partners have been fully paid.

Remington on Bankruptcy, Vol. 6, Section 2920, states that a general partner may not share in partnership assets until partnership creditors are paid and cites thereunder the case of *In re Rice*, 164 Fed. 514 D. C. Pa., which held that a general partner as a creditor should not participate in the partnership assets upon his claim until all partnership creditors were paid.

CONCLUSION.

We respectfully submit that the two orders of the referee, as amended by the trial judge, should be affirmed, to wit:

1. The order modifying the order adjudicating Gerry Horton Farms a bankrupt by including Kaufman-Brown Potato Company as one of the partners; being the Gerry Horton Farms that was in the business of raising potatoes and the one of which Kaufman-Brown was a creditor and the one of which Kaufman-Brown was a partner.

2. The order disallowing the claim of Kaufman-Brown Potato Company against the partnership of which it was a member, until all non-partner creditors were paid.

Dated, Bakersfield, California,
February 23, 1950.

Respectfully submitted,

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No. 12,390.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KAUFMAN-BROWN POTATO COMPANY, a Partnership composed
of Charles H. Kaufman and Albert H. Brown, Charles H. Kaufman and
Albert H. Brown,

Appellants,

vs.

WAYNE LONG, as Trustee in Bankruptcy of the Estates of Gerry Horton
and J. D. Althouse, doing business as Gerry Horton Company, a Co-
partnership; Gerry Horton and J. D. Althouse, doing business as Gerry
Horton Farms, a Co-partnership; Gerry Horton, an individual, and J. D.
Althouse, an individual,

Appellees.

REPLY BRIEF FOR APPELLANTS.

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MAR - 6 1950

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Horton Farms, a Co-partnership; Gerry Horton, an individual, and J. D.
Althouse, an individual,

Appellees.

REPLY BRIEF FOR APPELLANTS.

Counsel for appellees say, page 2 of their brief:

“Therefore the only appellee is Wayne Long as trustee in bankruptcy of the estate of Gerry Horton Farms, a copartnership composed of Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed only of Gerry Horton and J. D. Althouse.”

These proceedings were initiated by Wayne Long as Trustee of the Bankrupts [Tr. pp. 14, 22] named in the heading and caption of appeals. We think such caption is, therefore, correct.

I.

The Proceedings in the Bankruptcy Case Did Not Justify the Court in Entering an Order Adjudicating Gerry Horton Farms, an Alleged Copartnership Engaged in the Raising of Potatoes, a Bankrupt.

In our opening brief we contended that assuming, without conceding, a partnership existed known as Gerry Horton Farms composed of Gerry Horton Farms and Kaufman-Brown Potato Company, the most the Court could have done would be to direct the administration of the property of said alleged partnership on the theory that the acts of the Kaufman-Brown Potato Company were such that its consent to the administration of assets in the bankruptcy proceeding might be implied and that in going further and adjudicating such alleged partnership a bankrupt, the Court exceeded the proprieties and its power. We do not think that the argument of appellants in their brief has weakened that contention.

It appears that the appellees contend that Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, was not adjudicated a bankrupt on the involuntary petition, but that Gerry Horton Farms, a copartnership composed of Kaufman-Brown Potato Company and Gerry Horton Farms, was the Gerry Horton Farms which was adjudicated a bankrupt on the original petition in bankruptcy. They say we were in error when we said in our brief:

“In its order and findings the Court was particularly careful, however, not to decree or find that Kaufman-Brown Potato Company was a partner of

Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, the adjudicated partnership, but did decree and find that it was a partner with Gerry Horton Farms in a separate partnership known as Gerry Horton Farms engaged in the growing of potatoes, and adjudicated such partnership to be bankrupt as a distinct partnership, separate and apart from Gerry Horton Farms originally adjudicated a partnership.”

The record speaks for itself on this point.

It is admitted that there was a partnership known as Gerry Horton Farms, composed of Gerry Horton and J. D. Althouse. The involuntary petition in bankruptcy was directed against Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse. Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, was adjudicated a bankrupt by the original order of adjudication. In the findings of fact and conclusions of law, being Exhibit “A” attached to the order affirming the order of adjudication, we find the following [Tr. p. 77]:

“ . . . that the order of adjudication should be corrected, amended and modified by adding thereto in addition to those adjudged bankrupts, ‘Gerry Horton Farms, a partnership composed of Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse.’ ”

In Exhibit "B" attached to the order affirming order of referee re adjudication, which exhibit is the amendment and modification of the original order of adjudication, we find the following language [Tr. pp. 77, 78, 79]:

"1. That the order of adjudication of bankruptcy dated August 15, 1944, signed by Waldo R. Bergman, Referee in Bankruptcy, be and it is hereby amended and modified by changing the first paragraph of said order to read as follows:

'At Bakersfield, in the Southern District of California, on the 15th day of August, 1944, before Honorable Waldo R. Bergman, Referee in Bankruptcy, the petition of Kaufman-Brown Potato Company, a copartnership, Earl Cecil and J. Deacy Brown, doing business as Rosedale Warehouse Company, a copartnership, and John Lewis praying that Gerry Horton Company and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, and Gerry Horton and J. D. Althouse, individually, be adjudicated bankrupts within the true intent and meaning of the Act of Congress relating to bankruptcy, having been heard and duly considered; and it appearing that Gerry Horton Company is a partnership composed of J. D. Althouse and Gerry Horton; that Gerry Horton Farms, a copartnership, not engaged in the raising of potatoes, is composed of Gerry Horton and J. D. Althouse; that Gerry Horton Farms, a partnership engaged in the raising of potatoes, is composed of Kaufman-Brown Potato Company, a copartnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse; and that said partnerships of Gerry Horton Company, Gerry Horton Farms, not engaged in the raising of potatoes, and

Gerry Horton Farms, a partnership engaged in the raising of potatoes, and Gerry Horton, an individual, and J. D. Althouse, an individual, are all insolvent and that Kaufman-Brown Potato Company, a copartnership, one of the general partners of Gerry Horton Farms, the partnership engaged in the raising of potatoes, consented to the adjudication in bankruptcy and administration of the estate of Gerry Horton Farms, a partnership.'

"2. That Gerry Horton Company, a copartnership composed of Gerry Horton and J. D. Althouse; Gerry Horton Farms, the partnership not engaged in the raising of potatoes composed of Gerry Horton and J. D. Althouse; Gerry Horton Farms, a partnership engaged in the raising of potatoes composed of Kaufman-Brown Potato Company, a copartnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership consisting of Gerry Horton and J. D. Althouse; Gerry Horton, an individual; and J. D. Althouse, an individual, is each a bankrupt under the Act of Congress relating to bankruptcy and each is hereby declared and adjudged a bankrupt accordingly."

It is apparent, therefore, from a reading of the above, that counsel for appellees are in error when they say that Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, was not adjudicated a bankrupt on the involuntary petition, and it is further apparent that in addition to the parties already adjudicated bankrupt an additional alleged copartnership, composed of Gerry Horton Farms, the already adjudicated partnership, and Kaufman-Brown Potato Company, was adjudicated a bankrupt.

The proceedings in the case did not justify the order of adjudication as to said alleged partnership for the reason set forth in our opening brief.

Counsel for appellees in their brief, page 37, have cited *In re Fuller*, 9 F. 2d 553, as authority, holding that the joining of a non-bankrupt partner with a firm creditor in a petition asking that the former firm assets be applied first on firm debts, was a consent to an adjudication in bankruptcy. A reading of the case will show that the holding of the Court was that the consent was no more than that the property should be administered in the bankruptcy proceeding and that it did not hold that the consent was to an adjudication in bankruptcy.

II.

Kaufman-Brown Potato Company Was Not a Partner in Gerry Horton Farms.

In our opening brief we pointed out that in the relationship between Kaufman-Brown Potato Company and Gerry Horton Farms there could be no partnership in that there was no purpose of jointly carrying on a partnership business. Counsel for appellees attempt to supply this element of a partnership by urging that while Gerry Horton Farms, composed of Gerry Horton and J. D. Althouse, were to do the growing of the potatoes, Kaufman-Brown Potato Company was to do the selling. They overlook, however, that any selling on the part of Kaufman-Brown Potato Company was not a selling on behalf of any partnership in which they were a member. It is expressly provided in the agreements that Kaufman-Brown Potato Company might have the first right to purchase the potatoes, in which case they sold on their own account,

and, as to potatoes not purchased by them, Kaufman-Brown Potato Company agreed to handle said potatoes as agents for first parties. Gerry Horton and J. D. Alt-house, copartners doing business under the firm name and style of Gerry Horton Farms, were the first parties under said agreements.

The appellees in their brief quote certain language to the effect that Mr. Kendall, then attorney for the Kaufman-Brown Potato Company, admitted a partnership. In that the whole context shows that opposition was being made on that point, and the fact that this supposed admission came at a point where the Court was endeavoring to marshal claims so that, if it were thereafter adjudicated that Kaufman-Brown Potato Company was a member of the partnership, such marshaling would be effective, we think the language used by Mr. Kendall must have been used to distinguish one alleged partnership from the other alleged partnership in the prayer placement of claims. Furthermore, at Transcript, page 197, Mr. Kendall makes this unequivocal statement: "To make the issue clear: we admit it is a straight financing deal, and they are not partners." In fact Mr. Kendall as an attorney, on behalf of his clients could properly go no further than this statement.

The conversation of the parties prior to the making of the agreements, the agreements themselves, and the acts and conduct of the parties, distinctly show that a financing arrangement was intended and not a partnership. Furthermore, there appears to have been no holding out to creditors or to any one that Kaufman-Brown Potato Company was a member of Gerry Horton Farms. It would appear that the first thought that a partnership relationship existed between Gerry Horton Farms and Kaufman-

Brown Potato Company occurred during the course of the bankruptcy proceedings.

In the financing arrangement the profits to be gained by Kaufman-Brown Potato Company for the advancement of funds was the right to purchase potatoes and to obtain a percentage of expected profits. In the event it did not purchase the potatoes it had the right to sell same on a commission basis, and this consideration was an item to be considered in connection with profits. In that counsel for Gerry Horton Farms, first party to the agreements, prepared the agreements, if there are ambiguities in the same such ambiguities must be construed more strongly against Gerry Horton Farms.

The evidence plainly does not sustain the findings of the Court in respect to a partnership. The Court finds [Tr. p. 72]:

“ . . . each of the parties had the right and could make contracts and incur liabilities on behalf of said partnership and manage and control the business, and jointly carry on the business of said partnership; and said parties did jointly participate in the management and control of the business of said partnership.”

The evidence does not sustain this finding [Testimony of Gerry Horton, Tr. pp. 271, 272]:

“Q. Did they hire any of your help? A. Beg your pardon?

Q. Did they hire any of your help? A. No.

Q. Did they fire any of your help? A. No.

Q. Did they buy any material for your operations, any of the supplies? A. You mean did they sign the order for that, or did they pay for them?

Q. Did they buy any of it for the operation, themselves? A. No. I bought all the materials used in the operations.

Q. You were the manager all the way through, all through this deal, were you not? A. That is correct.

Q. Did they interfere any way whatever in your management of these operations? A. No.

Q. Did they have any right to sign checks on the bank account of the operation on the potato deal? A. No."

In our opening brief we confined our citations to cases setting forth controlling elements that must govern the determination as to whether a relationship was or was not a partnership. We did not elaborate on factual situations for, as was said in *Associated Piping etc. Co., Ltd. v. Jones* (17 Cal. App. 2d 107, at page 111):

"Each case, therefore, is adjudicated upon its own facts, and very little value will be found from any extended review of the authorities. That is precisely the case at bar, the question being as to whether appellant permitted himself to be represented as a partner and the reliance by third parties upon such representation."

However, we do submit that the case of *Martin v. Sharp & Fellows Contracting Co.*, 34 Cal. App. 584, mentioned in our opening brief at page 21, comes more nearly fitting the facts of the instant case than any of the cases cited by appellees.

The cases cited by counsel for the appellees in their brief are not of particular aid in arriving at the determination of the issues in this case. Appellees cite *Kersh v. Taber*, 67 Cal. App. 2d 499, at page 504, and, immedi-

ately following the excerpt quoted by counsel, we find the following:

“A partnership is an association of two or more persons to carry on as co-owners a business for profit. (Civ. Code, Par. 2400.) Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in profits and losses and in the management and control of the business. (*Black v. Brundige*, 125 Cal. App. 641 (13 P. 2d 999); *Smith v. Grove*, 47 Cal. App. 2d 456 (118 P. 2d 324); *Martin v. Sharp & Fellows Cont. Co.*, 34 Cal. App. 584 (168 P. 373); 20 Cal. Jur. 689, Par. 9.) The plaintiff in this case had no participation nor right to share in the management of the mining operations or the proceeds therefrom until after title to the mine had been procured.”

At page 505, we find the following:

“The main reliance of the plaintiffs is on the provision of the contract that the defendants were to share in a division of the profits. But this feature of the agreement has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and control of the business, and the proposed profit sharing was contemplated only as compensation or interest for the use of the money advanced.”

In *Lusher v. Silver*, 70 Cal. App. 2d 586, at page 588 in addition to the excerpt cited by counsel for the appellees, we find the following:

“On appeal defendant contends that the language testified to by plaintiff ‘why not go together and buy ourselves properties and split the profits on them’ is insufficient to establish a partnership as to the properties which the court found they bought and sold as partners.

“In the last analysis the *fact* of partnership depends upon the intention of the parties. To determine this intent not only the words of the agreement itself, but the actions and conduct of the parties may be considered. All the evidence should be taken into account to support the finding. (*Associated Piping and Engineering Co. v. Jones*, 17 Cal. App. 2d 107 (61 P. 2d 536.)”

In *Associated Piping etc. Co. v. Jones*, 17 Cal. App. 2d, page 107, cited by counsel for appellees on pages 23 and 24 of their brief, we find, at page 111, the following:

“As between the parties themselves, when the rights of no third persons are involved, the question is one of determination merely upon the letter of the contract and the conduct of the contracting parties to each other under it. When, however, the rights of third parties are involved, the basis of the inquiry shifts materially, and the fundamental question is: What had those parties the right to believe from the language of the contract and from the conduct of the parties to it as affecting them, and not as affecting each other?”

and the court held that there was ample evidence to show that the appellant permitted himself to be represented as a partner and that third parties relied upon said representation.

In *Lyon v. MacQuarrie*, 46 Cal. App. 2d 119, cited by counsel for appellees in their brief on page 25, we find the following excerpt of testimony at page 122:

“Q. Did you discuss with him at that time on what basis the partnership would be? A. We said we have always been together and whatever was yours was mine and vice versa. And ‘Whatever I

make in this, fifty per cent is yours.' I said, 'Isn't this a coincidence, because that steel deal I was telling you about—the hardening of steel out of a product called tetralloy that I have had.' I said, 'It is just a coincidence. I am going to make some money on that.' And I said, 'You are in fifty per cent on that deal with me, just like I am fifty per cent on this radio act with you.' He said, 'O. K.; that is O. K. by me; shake. We are partners.' ”

On conflicting evidence the court held a partnership existed.

Thompson v. O. W. Childs Estate Co., 90 Cal. App. 552, cited by counsel for the appellees on page 25 of their brief, differs from our case in that no question of a financing arrangement appeared in the case.

Other cases cited by counsel for appellees turn upon the question of conflicting evidence and, in certain instances, upon the conduct and the dealing with the world of the parties asserted to be partners.

On page 21 of our opening brief we cited *Martin v. Sharp & Fellows Contracting Co.*, 34 Cal. App. 584, at page 588, as authority that there must be a purpose of jointly carrying on the business before there can be said to be a partnership. There are numerous authorities to this effect. In one of those cases, *O. Krenze C. & B. Works, Inc. v. England*, 109 Cal. App. 747, the excerpt quoted by us is quoted in the case and likewise it is there said, at page 751:

“The testimony also shows that all the manufacturing, buying and selling was done by Moss; that defendant took no part in arranging for the location of the business or the leasing of the premises where

the same was conducted; that Moss purchased the office equipment and engaged and directed the employees; that defendant was not authorized to draw checks upon the bank account of the concern and had no access to the books; further, that he exercised no supervision over the business or gave Moss instructions respecting its management, nor did the agreement give him the right to do any of these things. It was testified by defendant that he did not intend to form a partnership, and by Moss that he was conducting the business under the described contract."

The Court held that no partnership existed.

Conclusion.

We respectfully submit, as we did in our opening brief, that from the facts and the law the three orders involved in this consolidated appeal should be reversed.

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